CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1929~~ 1930

No. ~~556~~ 24

NOAH CROOKS, COLLECTOR OF INTERNAL REVENUE, PETITIONER

vs.

BENJAMIN HARRELSON ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 3, 1930
CERTIORARI GRANTED FEBRUARY 24, 1930

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 556

NOAH CROOKS, COLLECTOR OF INTERNAL REVENUE, PETITIONER

vs.

BENJAMIN HARRELSON ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

INDEX

	Original	Print
Proceedings in U. S. C. C. A., Eighth Circuit	A	1
Caption (omitted in printing)	A	1
Record from D. C. U. S., Western Missouri	1	1
Citation and service (omitted in printing)	1	1
Caption (omitted in printing)	2	1
Petition	2	1
Summons and marshal's return (omitted in printing)	5	3
Record entry of filing of demurrer to petition	6	4
Demurrer to petition	7	4
Order of submission of demurrer to petition	7	4
Order overruling demurrer to petition	7	4
Judgment	7	4
Record entry of filing of petition for appeal, etc	8	5
Petition for appeal	8	5
Assignment of errors	9	6
Order allowing appeal	9	6
Record entry of filing of præcipe for transcript	9	7
Præcipe for transcript	9	7
Opinion, Otis, J., on overruling of demurrer to petition	10	7
Clerk's certificate to transcript (omitted in printing)	12	9
Appearances of counsel (omitted in printing)	13	9
Argument and submission (omitted in printing)	14	9
Opinion, Booth, J.	15	10
Judgment	25	16
Motion for stay of mandate	26	17
Order staying mandate	27	18
Clerk's certificate (omitted in printing)	28	18
Order allowing certiorari	29	18

A [Caption omitted.]

1 [Citation in usual form showing service on Massey Holmes et al., filed Dec. 15, 1928, omitted in printing.]

2 [Caption omitted.]

6918

BENJAMIN HARRELSON, MALETA H. SCOTT, LENA HARRELSON, FRANK Harrelson, Sarah Harrelson, Annie H. Green, Helen Harrelson, Howard M. Harrelson, Alma H. Allison, and Martin Harrelson, plaintiffs

vs.

NOAH CROOKS, COLLECTOR OF INTERNAL REVENUE FOR THE SIXTH United States Collection District of Missouri, defendant

In United States District Court, Western Missouri

Petition

Filed Aug. 20, 1927

Benjamin Harrelson, Maleta H. Scott, Lena Harrelson, Frank Harrelson, Sarah Harrelson, Annie H. Green, Helen Harrelson Howard M. Harrelson, Alma H. Allison, and Martin Harrelson, as sole beneficiaries and distributees under the will of William H. Harrelson, deceased, plaintiffs, respectfully show to the court:

1. That William H. Harrelson, of Kansas City, Missouri, died testate on March 8, 1920; that plaintiffs were the sole beneficiaries named in said will and the sole distributees of the estate of the said William H. Harrelson, deceased; that William S. Flournoy, John P. Flournoy, and Henry Knepp were the duly appointed and qualified executors under said will, and letters testamentary were duly issued to them; that they thereafter proceeded with the administration of said estate; that on or about the 5th day of March, 1925, said administration was finally closed; said executors were finally discharged and the property and assets of said estate were duly and lawfully distributed among the plaintiffs as the sole beneficiaries and distributees thereof, and plaintiffs duly accepted their respective portions of said estate under said distribution and are now the lawful owners thereof and entitled to collect any and all claims on behalf of said estate which were not collected at the date of the closing of the administration thereof.

That defendant is the collector of internal revenue for the said sixth United States collection district of Missouri.

3 2. That said executors, acting under the provisions of the revenue act of 1918, approved February 24, 1919, filed within due time with the collector of internal revenue for the sixth United States collection district of Missouri a return for the purposes of the

Federal estate tax showing a total net estate of real and personal property of $2,137,204.

3. That the Commissioner of Internal Revenue, acting for the United States upon a final audit and review of said estate-tax return, determined that the total net valuation of said decedent's estate for estate-tax purposes was $2,279,068.28, of which amount the real estate owned by said decedent at the time of his death and situated in the State of Missouri was valued at $269,730.00.

4. Said executors paid to defendant, collector of internal revenue for the sixth United States collection district of Missouri, the sum of $200,569.58, representing the Federal estate tax on the transfer of said estate as finally determined by the said Commissioner of Internal Revenue, together with interest in the sum of $6,569.43, said payments of tax and interest having been made at various times, to wit, on or about February 21, March 4, March 8, September 9, and October 25, 1921, and March 23, March 24, and July 24, 1922.

5. On January 31, 1925, said executors, acting through William S. Flournoy, filed with the defendant as collector aforesaid a claim for refund of $37,762.20, Federal estate tax, said claim being based upon the contention by said executors that the value of the real estate situated in Missouri and owned by the decedent at the time of his death was not, under the provisions of the revenue act of 1918, properly subject to the Federal estate tax and that the tax paid on the value thereof by said executors was illegally assessed and collected and should be refunded to plaintiffs.

6. That subsequently, on August 20, 1925, the said Commissioner of Internal Revenue rejected said claim for refund in its entirety.

7. That at the time of his death said decedent owned real estate situated in the State of Missouri having an aggregate value of $269,730.00, which value was erroneously and illegally included by the Commissioner of Internal Revenue in arriving at the value of the gross estate of said decedent and in arriving at the amount of the Federal estate tax due from said estate under the revenue act of 1918, approved February 24, 1919.

4 8. That the action of the Commissioner of Internal Revenue in including in the value of the gross estate of the decedent the value of the real estate situated in the State of Missouri and owned by the decedent at the time of his death, to wit, $269,730.00, and in assessing and collecting the Federal estate tax on such basis was erroneous and illegal in this, to wit:

That section 402 of the revenue act of 1918, approved February 24, 1919, provided that the value of the gross estate of the decedent should be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—(a) to the extent of the interest therein of the decedent at the time of his death which after his death was subject (1) to the payment of the charges against his estate and (2) to the payment of

the expenses of administration of his estate and (3) to distribution as part of his estate.

That under the laws of the State of Missouri, under which the estate of said decedent was administered, the real estate situated in the State of Missouri and owned by the decedent at the time of his death was not subject to the payment of the expenses of administration of said estate, and for this reason the value of said real estate should not, and could not lawfully, have been included in the value of the gross estate of the decedent for the purpose of calculating the amount of the Federal estate tax due from said estate.

9. That in arriving at the amount of Federal estate tax due from said estate said Commissioner of Internal Revenue erroneously and illegally and without authority of law calculated said tax upon an alleged taxable estate of $2,279,068.28, including the value of said real estate situated in Missouri, resulting in the assessment and collection of a tax in the sum of $200,569.58, plus interest in the sum of $6,569.43, whereas said tax should have been calculated in accordance with law and the terms of said revenue act of 1918 upon a taxable net estate of $2,009,338.28, excluding the value of said Missouri real estate, which would have resulted in the assessment and collection of a tax in the sum of $162,807.38, and thereupon the estate to which plaintiffs were entitled under the will of the said William H. Harrelson was reduced by the sum of $37,762.20.

10. Plaintiffs are justly entitled to recover from the defendant herein, after allowing all just credits and set-offs, the sum of $37,762.20, together with interest on said sum at the rate of 6% per annum from July 24, 1922, and plaintiffs demand judgment against said defendant in said amount, principal and interest.

Benjamin Harrelson, Maleta H. Scott, Lena Harrelson, Frank Harrelson, Sarah Harrelson, Annie H. Green, Helen Harrelson, Howard M. Harrelson, Alma H. Allison, Martin Harrelson (by Massey Holmes, F. S. Bright, & L. C. Connally, their attorneys), distributees under the will of William H. Harrelson, decd.

MASSEY HOLMES,
FRANK S. BRIGHT,
L. C. CONNALLY,
Attorneys for Plaintiffs.

[*Duly sworn to by Benjamin Harrelson; jurat omitted in printing.*]

[File endorsement omitted.]

[Writ of summons with marshal's return, filed Sept. 9, 1927, omitted in printing.]

6 In United States District Court

Record entry demurrer

Filed Sept. 20, 1927

This day comes defendant, by his attorney, and files demurrer herein.

7 In United States District Court

Demurrer

Filed Sept. 20, 1927

Comes now the defendant, by its attorney, Roscoe C. Patterson, United States attorney for the Western District of Missouri, and demurs to the plaintiffs' petition herein for the reason that said petition wholly fails to state facts sufficient to constitute a cause of action.

ROSCOE C. PATTERSON,
United States Attorney,
By HARRY L. THOMAS,
Assistant.

[File endorsement omitted.]

In United States District Court

Record entry, demurrer submitted and taken under advisement

Sept. 26, 1927

This day come the parties, by counsel, and defendant's demurrer is heard by the court and taken under advisement.

In United States District Court

Record entry, demurrer overruled

Sept. 13, 1928

This day there is filed herein by Judge Merrill E. Otis memorandum opinion overruling the demurrer of the defendant herein.

In United States District Court

Judgment

Filed Dec. 14, 1928

Now on this 14th day of December, 1928, this cause having heretofore come on to be heard upon the demurrer of defendant to the

petition of plaintiff and having been submitted to the court upon argument and briefs of counsel, the court, upon consideration thereof, and being fully advised in the premises, is of the opinion and does hereby order that said demurrer be, and the same hereby is, overruled.

And thereupon said defendant, not asking to plead further but declining to plead further within the time allowed by the court, it is considered, ordered, adjudged, and decreed by the court that the said plaintiffs, Benjamin Harrelson, Maleta H. Scott, Lena Harrelson, Frank Harrelson, Sarah Harrelson, Annie H. Green, Helen Harrelson, Howard M. Harrelson, Alma H. Allison, and Martin Harrelson, have judgment against and recover from the said defendant, Noah Crooks, collector of internal revenue for the sixth United States collection district of Missouri, the said sum of $37,-
762.20, the amount claimed in the petition, with interest
8 thereon at 6% per annum from July 24, 1922, computed according to the provisions of the revenue act approved May 29, 1928, and costs, and that plaintiffs have execution therefore against defendant.

MERRILL E. OTIS, *Judge.*

Approved this 14th day of December, 1928.

FRANK S. BRIGHT,
LOWNDES C. CONNALLY,
MASSEY HOLMES,
Attorneys for Plaintiffs.
ROSCOE C. PATTERSON, *U. S. Atty.*,
HARRY L. THOMAS, *Asst. U. S. Atty.*,
Attorneys for Defendant.

[File endorsement omitted.]

In United States District Court

Record entry, application for appeal, etc.

Filed, Dec. 15, 1928

This day comes defendant, by his attorney, and files application for an appeal and assignment of errors.

In United States District Court

Application for appeal

Filed Dec. 15, 1928

To the Hon. MERRILL E. OTIS, *District Judge:*

The above-named defendant, Noah Crooks, collector of internal revenue for the sixth United States collection district of Missouri, feeling grieved by the judgment rendered and entered in the above-

entitled cause on the 14th day of December, 1928, does hereby appeal from said judgment to the Circuit Court of Appeals for the Eighth Circuit, for the reasons set forth in the assignment of errors filed herewith, and prays that the appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings, and documents upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Eighth Circuit under the rules of such court in such cases made and provided.

NOAH CROOKS,
By ROSCOE C. PATTERSON,
United States Attorney,
By HARRY L. THOMAS,
Assistant U. S. Attorney,
Attorneys for Defendant.

[File endorsement omitted.]

9 In United States District Court

Assignments of error

Filed December 15, 1928

And now comes the above-named defendant, the appellant herein, by his attorney of record, and assigns, as errors upon which he will rely, the following errors as having intervened in the record, proceedings, and judgment of the United States District Court in the above-entitled cause, to wit:

1. The court erred in overruling defendant's demurrer to plaintiff's petition.

2. The court erred in rendering judgment for plaintiffs and against the defendant.

Wherefore appellant prays that the judgment entered in said cause in the said District Court may be reversed and said cause remanded.

ROSCOE C. PATTERSON,
United States Attorney,
By HARRY L. THOMAS, *Assistant.*

[File endorsement omitted.]

In United States District Court

Order allowing appeal

Filed December 15, 1928

Upon petition of defendant herein it is ordered that an appeal to the United States Circuit Court of Appeals for the Eighth Circuit, from the judgment heretofore filed and entered in this cause on

the 14th day of December, 1928, be, and the same is hereby, allowed, and that a certified transcript of the record, in accordance with the rules of practice of the courts of the United States, be transferred to the said United States Circuit Court of Appeals.

MERRILL E. OTIS, *Judge.*

[File endorsement omitted.]

In United States District Court

Record entry, præcipe for transcript

Filed December 17, 1928

This day comes defendant, by attorney, and files præcipe for transcript of record herein.

In United States District Court

Præcipe for transcript

Filed December 17, 1928

Please furnish the United States attorney, on behalf of the defendant herein, transcript of the following pleadings and records, upon proper certificate:

1. Petition and summons.
2. Demurrer.
3. Memorandum opinion overruling demurrer.
4. Judgment.
5. Application for appeal.
6. Assignment of errors.
7. Order allowing appeal.
8. All record entries.
9. Præcipe for transcript.

ROSCOE C. PATTERSON,
United States Attorney,
By HARRY L. THOMAS,
Assistant United States Attorney.

[File endorsement omitted.]

In United States District Court

Memorandum opinion on demurrer

Filed September 13, 1928

Plaintiffs sue to recover from the defendant the sum of $37,762.20, with interest, alleged to have been unlawfully collected as a tax out of an estate inherited by them. The total value of the estate is alleged in the petition to have been $2,137,204.22, which included both real

and personal property. The value of the real estate included was $269,730.00 and the amount involved in this suit was that part of the tax collected which was based upon the value of the real estate. Defendant has demurred to the petition on the ground that it states no cause of action.

The statute which fixes the basis for the assessment of the estate tax, being the revenue act of 1918 (40 Stat. 1057–1097) is:

"SECTION 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

"(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and to distribution as part of his estate; * * *."

11 It will be noted that property may not be included in the value of the gross estate of a decedent unless after his death three facts exist with reference to it. Of these one is that the property is subject to the expenses of the administration of the estate. If all three facts are not present, including this one, then the property may not be included in calculating the value of the estate to be taxed. (United States vs. Field, 255 U. S. 257, 262.)

The theory of the case is that real estate in Missouri is not subject to expenses of administration and that therefore the real estate here should not have been included in determining the amount of tax due.

The defendant disputes this theory.

The only question for consideration then is whether in Missouri real estate is subject to expenses of administration and that question is to be determined by the State law.

The question must be resolved in plaintiffs' favor. Repeated decisions of Missouri appellate courts announce the law of this State to be that real estate is not subject to administration expenses. Among other cases are the following: In re Motier Estate (7 Mo. App. 514), Ritchey vs. Withers (72 Mo. 556), Elstroth vs. Young (94 Mo. App. 351), State vs. Doud (269 S. W. l. c. 924). I have found no decision by a Missouri court, with one exception, which holds to the contrary. The exception is Elstroth vs. Young (88 Mo. App. 418), decided by the St. Louis Court of Appeals April 9, 1901. But that decision, to the extent that it announced a doctrine contrary to the one generally stated, was repudiated by the same court in a later consideration of the same case (Elstroth vs. Young, 94 Mo. App. 351).

The defendant cites Howell vs. Jump (140 Mo. 441).

In the Howell case, under an order directing the sale of real property to pay debts of the estate in accordance with what is now section 141, Revised Statutes of Missouri, 1919, real estate was sold and a portion of the proceeds was applied to the payment of administration expenses. The validity of the sale was upheld because the order upon which the sale had been made was a lawful order. It

was held that the fact that a part of the proceeds was improperly diverted to the payment of administration expenses did not invalidate the sale. The language of the court was as follows:

"The fact that the land only sold at the administrator's sale for enough to pay the costs of the administration does not
12 defeat this sale. It is true a sale of land by an administrator can only be made for the payment of the debts of deceased. A sale made merely for the purpose of paying the costs of administration has been held to be invalid. (Farrar vs. Dean, 24 Mo. 16.) But in this sale there were debts remaining unpaid and the sale was made for the purpose of paying them. The court therefore had jurisdiction to order the sale and the purchaser was not bound to bid an amount which would pay the debts or to see that the money paid was properly applied. (Emphasis mine.)"

Clearly this case not only does not conflict with but supports plaintiffs' theory.

Defendant cites the case of Steedman vs. United States, a decision by the Court of Claims involving the same question as that involved here. I have read the opinion in that case carefully. I think it is not well reasoned and that its conclusion is erroneous.

The demurrer is overruled.

MERRILL E. OTIS,
District Judge.

[File endorsement omitted.]

[Clerk's certificate to foregoing transcript omitted in printing.]

13 [Appearances of counsel omitted in printing.]

14 [Minute entry of argument and submission June 4, 1929, omitted in printing.]

15 In United States Circuit Court of Appeals, Eighth Circuit

No. 8533, May term, A. D. 1929

NOAH CROOKS, COLLECTOR OF INTERNAL REVENUE, appellant vs. BENJAMIN HARRELSON ET AL., APPELLEES	Appeal from the District Court of the United States for the Western District of Missouri.

Mr. William T. Sabine, jr., special attorney, Bureau of Internal Revenue (Mr. William L. Vandeventer, United States attorney, Mr. Harry L. Thomas, assistant United States attorney, and Mr. C. M. Charest, General Counsel, Bureau of Internal Revenue, were with him on the brief), for appellant.

Mr. S. L. Swarts and Mr. F. S. Bright (Mr. Massey Holmes and Mr. L. C. Connally were with them on the brief) for appellees.

Before STONE, BOOTH, and GARDNER, Circuit Judges

Opinion

Filed Oct. 1, 1929

BOOTH, Circuit Judge, delivered the opinion of the court.

This was an action brought by the appellees, beneficiaries under the will of William H. Harrelson, deceased, against Noah Crooks, appellant, as collector of internal revenue for the sixth United States collection district of Missouri. The action was to recover a refund of $37,762.20 of Federal estate taxes which had been paid by the executors of the estate.

16 The complaint alleged that William H. Harrelson of Kansas City, Missouri, died testate March 8, 1920; that the executors under his will in due time, acting under the provisions of the revenue act of 1918, filed with the collector of internal revenue a return for the purposes of the Federal estate tax; that the Commissioner of Internal Revenue upon a final audit and review determined that the total net valuation of decedent's estate for Federal estate-tax purposes was $2,279,068.28, of which amount the value of the real estate owned by decedent at the time of his death was $269,730; that the amount of the tax as fixed by the Commissioner of Internal Revenue was paid by the executors, and a claim for refund of $37,762.20 was filed, based upon the contention that the value of the real estate situated in Missouri and owned by the decedent at the time of his death was not, under the provisions of the revenue act of 1918, subject to the Federal estate tax, and that the amount of the tax ($37,762.20) paid on the value of said real estate was illegally assessed and collected and should be refunded.

The complaint further alleged:

"That under the laws of the State of Missouri under which the estate of said decedent was administered the real estate situated in the State of Missouri was owned by the decedent at the time of his death was not subject to the payment of the expenses of administration of said estate, and, for this reason the value of said real estate should not, and could not lawfully, have been included in the value of the gross estate of the decedent for the purpose of calculating the amount of the Federal estate tax due from said estate."

The defendant demurred to the complaint. The court overruled the demurrer, and the defendant refusing to plead further, judgment was entered for the plaintiffs in the amount asked.

The question involved in this appeal is whether under the provisions of section 402 (a) of the revenue act of 1918 the value of real estate situated in the State of Missouri should be included in the value of the gross estate of the decedent Harrelson, who died the owner thereof.

Section 402 (a) of the revenue act of 1918 reads as follows:

"SEC. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death
17 of all property, real or personal, tangible or intangible, wherever situated—

"(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate."

There are two main contentions made by the appellant: (1) That section 402 (a) has no application to real estate, but applies only to personal property; (2) even if the statute has application to real estate, yet that real estate in Missouri is subject to the payment of the expenses of administration.

The argument that section 402 (a) relates solely to personal property is based upon the use of certain phrases and words used in the section. It is contended that the phrases "subject to the payment of the charges against his estate," "the expenses of its administration," and "subject to distribution as part of his estate" were all anciently used in connection with personalty only; that Congress knew this and accordingly used the phrases with their ancient technical meaning and as relating solely to personal property.

We do not acquiesce in the contention thus made for several reasons. It was doubtless the intention of Congress to include both real estate and personal property within the provisions of section 402 considered as a whole. The entire section constitutes a single sentence. The opening words of the section, "That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated," include no definite amount of any kind of property. It is only by reading the opening words in connection with one or more of the clauses (a) to (f) that any definite amounts of any kind of property can be arrived at. Clauses (a) to (f) are what their language states them to be—extent clauses and not exception clauses. If, therefore, clause (a) should be construed as relating to personal property only, a large amount of real property would not be included within the purview of section 402 at all, for the opening words of that section, read in connection with clauses (b) to (f),
18 would fail to cover many interests in real property. Furthermore, the argument of appellant, based upon the ancient technical meaning of the words used in section 402 (a) goes too far and defeats itself. The word "distribution" as applied to estates meant at common law the division of estates of intestates only. It was not properly applied to testate estates. (18 C. J. 803; Roger v. Gillett, 9 N. W. 204 (Iowa).) If, therefore, the ancient technical meaning is applied in section 402 (a), personal property of intestate estates only would be covered,

while personal property passing by will would not be included. Such a result plainly could not have been intended by Congress.

Our conclusion on this branch of the case is that the language of section 402 (a) is not to be given any ancient technical meaning, but is to be read giving to the words their ordinary, popular meaning, and that when so read both real and personal property are included.

With such meaning given to the words used the construction of section 402 (a) is, in our opinion, perfectly plain. The value of such real estate of the decedent as fulfills the conditions of clause (a), and such only, is to be included in the value of the gross estate. The conditions attaching to such real estate are that the decedent at the time of his death had an interest therein, that the real estate after the death of decedent is subject to the payment of the charges against this estate, that the real estate is subject to the expenses of the administration of the estate, that the real estate is subject to distribution as part of the estate of decedent. In our opinion it makes very little practical difference whether these conditions are considered as four separate independent conditions or three separate conditions, treating the second and the third as a single but combined condition. The latter method seems to have been adopted as a matter of convenience in the case of United States v. Field (255 U. S. 257). There was no intimation, however, in thus combining two of the conditions that both were not equally important. Nor was there any intimation that the word "and" before the words "the expenses of its administration" in section 402 (a) should be construed as meaning "or," which is what the appellant in effect contends for. What the Field case did hold was that all of the conditions must be met before the property could be in-
19 cluded as part of the gross estate, that the particular property there in question was not "subject to distribution as part of the testator's estate," and therefore was not thus included.

It may also be noted that the regulations relating to the estate tax which were promulgated by the Commissioner of Internal Revenue after the decision in the Field case expressly recognize that real estate in order to be included in the gross estate must fulfill the condition that such real estate is "subject to * * * the payment of the expenses of * * * administration." This condition is recognized as an independent one. (See Regulations 63, article 11, approved by the Secretary of the Treasury July 27, 1922, under the revenue act of 1921; Regulations 68, article 10, approved by the Secretary of the Treasury March 26, 1925, under the revenue act of 1924.) The revenue act of 1926 cut out all of the conditions contained in section 402 (a) of the revenue act of 1918, except the first—"(a) to the extent of the interest therein of the decedent at the time of his death"; so that under the present law the question here involved can no longer arise.

It is also a contention of counsel for appellant that the expression "charges against his estate" in section 402 (a) includes "expenses

administration." To hold thus would be to wipe out a plain distinction made by the statute itself, and which has existed in many jurisdictions; to hold thus would also violate one of the primary canons of statutory construction—that each clause and each word of a statute should, if reasonably possible, be given meaning and effect. We think this contention of counsel should not be sustained.

As to the second main contention—that in the State of Missouri real estate is subject to the payment of the expenses of administration of the estate—the question involved is purely one of local law. (Clarke v. Clarke, 178 U. S. 186; Olmsted v. Olmsted, 216 U. S. 386; Wardell v. Blum, 276 F. 226; In re Barnett, 12 F. (2d) 73.)

At common law real estate of a decedent was not subject to the payment of his simple contract debts, nor to the payment of legacies, nor to the payment of the expenses of administering the estate. (24 C. J. 459; United States v. Drennen, 25 Fed. Cas. #14,992; Titterington v. Hooker, 58 Mo. 593; McQuitty v. Wilhite, 218 Mo. 586, 592.

20 Most of the States have by statute changed the common-law rule as relating to debts and have made the real estate subject to the payment of debts in case the personal property is insufficient for that purpose. Some of the States have by statute made the real estate subject also to the payment of the expenses of administration of the estate. Missouri has by statute modified the common-law rule so far as concerns debts and legacies. Section 141, Revised Statutes of Missouri, 1919, reads as follows:

"SEC. 141. SALE OF LANDS TO PAY DEBTS.—If any person die and his personal estate shall be insufficient to pay his debts and legacies, his executor or administrator shall present a petition to the proper court, stating the facts; and praying for the sale of the real estate, or so much thereof as will pay the debts and legacies of such deceased person."

In Missouri the common law is in force and effect except in so far as it has been modified by statute. (R. S. Mo. 1919, sec. 7048; Lindell v. McNair, 4 Mo. 380; Reaume v. Chambers, 22 Mo. 36; Baker v. Crandall, 78 Mo. 584.)

The common-law rule that real estate of a decedent is not subject to the payment of administration expenses is, we think, clearly recognized in Missouri.

In Farrar v. Dean (24 Mo. 16, 18) the court said:

"The administrator has no power over the real estate, except so far as to hold it for the payment of the debts of the deceased, and when there are no debts the land descends to the heirs or escheats to the State, and it is not in the power of the administrator to hinder this legally, nor can the probate court direct or order a sale of real estate for costs accrued after the administration begins, and only because it did begin. Such costs are not debts due by the deceased, nor debts at the time of the death of the intestate."

In Presbyterian Church, etc., v. McElhinney (61 Mo. 540, 542-3), the court said:

"Under our statute respecting administration and the repeated adjudication of this court thereon probate courts possess no power to allow any claims against a decedent's estate or to order the
21 sale of land belonging thereto, except for the payment of the debts of the deceased, i e., those in existence at the date of his death."

In the case In re Motier's Estate (7 Mo. App. 514, 517) the court said:

"The land belongs to the heirs. It can not be touched for any of the purposes of the administration, except in the specific mode and for the specific objects elsewhere indicated by statute. When real estate is converted into money, whatever surplus remains after a proper application of the objects of the conversion still represents the realty for the benefit of the heirs, and can not be merged in the personalty for purposes which pertain only to that classification."

In Ritchey v. Withers (72 Mo. 556), a case in which land was sold by the administrator for the payment of debts, but part of the proceeds was used for the payment of improvements and repairs and for additional allowance to the widow, the court said (p. 559):

"The County Court had no power to order the sale of real estate except for the payment of debts, and when it was sold for that purpose the proceeds arising from the sale could not be diverted from it and applied to another and different purpose. The County Court could not have ordered a sale of the land for the purpose of paying the administrators for expenses incurred in making improvements thereon, nor for the purpose of raising money to appropriate to the widow for her support for twelve months, and it was equally powerless to appropriate to either of said purposes any part of the proceeds derived from a sale of land made to raise money to pay debts."

In State v. Doud (269 S. W. 923, 924 (Mo. App.)) the court said:

"If the real estate is sold by order of the probate court for the payment of the debts of the decedent, any surplus of the proceeds of the sale remaining after payment of the debts goes to the heir or devisee, and if the heir or devisee has conveyed the real estate the surplus belongs to her grantee. In other words, when real esate is converted into money for the payment of the debts of the decedent, the surplus of the proceeds of the sale remaining, after payment of the debts, retains the character of real estate for the purpose
22 of succession or distribution, and goes to the person in whom the title to the real estate was vested when it was converted."

(See also Teverbaugh v. Hawkins (82 Mo. 180), Garnett v. Carson (11 Mo. App. 290), In re Estate of Lloyd (44 Mo. App. 670).)

The cases of Elstroth v. Dickmeyer (88 Mo. App. 418) and Elstroth v. Young (94 Mo. App. 351) when rightly understood are in harmony with the foregoing cases. In the Elstroth cases the expenses which were allowed to be paid out of the proceeds of land sold by order of court were the expenses and commissions incurred

in or as incidental to the sale of the lands and were not the ordinary expenses of administration. The distinction is recognized by the court in the following language in Elstroth v. Young (pp. 355–356):

"The proceeds of the sale of lands made by an order of the probate court in pursuance of the provisions of Chapter I, Article 8, Revised Statutes, 1899, can not be used for the purpose of making good deficiencies in the expenses of administration."

In Howell v. Jump (140 Mo. 441) land was ordered sold to pay debts. The proceeds were applied by the administrator to the payment of the costs of administration and of the sale. The court recognized the rule in Farrar v. Dean, supra, but held that the sale would not be set aside because of the misapplication of the proceeds.

From the foregoing review of the Missouri authorities, we think, it is clear that real estate of a decedent in that State can not be sold for the payment of expenses of administration, nor can the proceeds of land sold to pay debts be lawfully used to pay expenses of administration. We think it follows that such real estate is "not subject" to the payment of expenses of administration within the meaning of section 402 (a). We hold therefore that the value of the real estate in question should not have been included in the value of the gross estate of the decedent.

The recent cases in this court of United States v. Waite (33 F. (2d) 567), United States v. Dietz (33 F. (2d) 576), Allen v. Henggeler (32 F. (2d) 69) have been called to our attention.

In the Waite case the question involved was whether the value of the share which a widow may elect to take in lieu of the provision of a will under the Missouri statute should be included in
23 determining the value of the gross estate of the decedent under section 402 of the revenue act of 1918. The court proceeded on the assumption that both real and personal property were involved. It held that the value of the real estate should be included in determining the value of the gross estate, not because the real estate fulfilled the conditions of section 402 (a), but because it fulfilled the condition of section 402 (b). The value of the personal property was included because the personal property fulfilled the condition of section 402 (a).

In neither the Dietz case nor the Henggeler case was the question which is involved in the case at bar discussed or determined.

The case of Steedman v. United States (63 Ct. Cls. 226) involved a question identical with that in the case at bar, and a conclusion was reached by that court opposite to the one which we have above indicated. We have the utmost respect and deference for the opinions of that court. We have therefore given careful thought and consideration to the opinion in the Steedman case, and we regret that we are unable to acquiesce in the conclusion therein reached.

Whatever may be our views as to the wisdom of the condition in question, contained in section 402 (a), yet that condition was part of the law at the time of decedent's death. The executors of his will and the beneficiaries thereunder had the unquestionable right to in-

sist that the condition should be given effect in computing the value of the gross estate of decedent. It is our duty to construe the statute as we find it. In United States v. Merriam (263 U. S. 179, 187–8) the court in its opinion used the following language which, we think, is apposite here:

"On behalf of the Government it is urged that taxation is a practical matter and concerns itself with the substance of the thing upon which the tax is imposed rather than with legal forms or expressions. But in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the Government and in favor of the taxpayer. (Gould v. Gould, 245 U. S. 151, 153.) The rule is stated by Lord Cairns in Partington v. Attorney General (L. R. 4 H. L. 100, 122):

24 "'I am not at all sure that in a case of this kind, a fiscal case, form is not amply sufficient, because, as I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, can not bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible in any statute what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.' And see Eidman v. Martinez (184 U. S. 578, 583)."

For the reasons above outlined we think that the judgment of the court below was right. It is therefore affirmed.

25 In United States Circuit Court of Appeals, Eighth Circuit.

No. 8533

NOAH CROOKS, COLLECTOR OF INTERNAL REVENUE, APPELLANT

vs.

BENJAMIN HARRELSON, MALETA H. SCOTT, LENA HARRELSON, FRANK Harrelson, Sarah Harrelson, Annie H. Green, Helen Harrelson, Howard M. Harrelson, Alma H. Allison, and Martin Harrelson

Appeal from the District Court of the United States for the Western District of Missouri

Judgment

October 3, 1929

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Missouri and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed with costs, and that Benjamin Harrelson, Maleta H. Scott, Lena Harrelson, Frank Harrelson, Sarah Harrelson, Annie H. Green, Helen Harrelson, Howard M. Harrelson, Alma H. Allison, and Martin Harrelson have and recover against Noah Crooks, collector of internal revenue, the sum of dollars for their costs herein.

26 In United States Circuit of Appeals

Motion for stay of mandate

Filed December 5, 1929

On this fifth day of December comes Harry L. Thomas, assistant United States attorney for the Western District of Missouri, and respectfully suggests to the court that in the above-entitled cause a writ of certiorari is being sought in the Supreme Court on behalf of the appellant and by the authority and direction of the Attorney General; that unless the mandate herein is stayed the appellant will not be able to present his application for certiorari; that under date of December 4, 1929, telegraphic instructions of the Attorney General directed the applicant herein to apply for this order, said telegram being hereto attached.

Wherefore the appellant prays that the mandate herein be stayed for a period of thirty days for the reasons above stated.

HARRY L. THOMAS,
Assistant United States Attorney,
Attorney for Appellant.

Western Union

1929 Dec. 4, p. m. 4.04.
RXKB290 34 Govt.—KANSAS CITY, Mo., *4, 3.59 p.*

HARRY L. THOMAS,
Assistant U. S. Attorney,
Care U. S. Circuit Court of Appeals,
St. Louis, Mo.:

Wire received reading quote If mandate in Crooks versus Harrelson has not been stayed for full period allowed for filing petition for certiorari, secure additional stay immediately. Mitchell, Attorney General. unquote. Handle while there.

VANDEVENTER.

27 [File endorsement omitted.]

In United States Circuit Court of Appeals

Order staying issuance of mandate

December 5, 1929

On consideration of the motion of appellant for a stay of the mandate in this cause, pending a petition to the Supreme Court of the United States for a writ of certiorari, it is now here ordered by this court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the clerk of this court a certificate of the clerk of the Supreme Court of the United States that a petition for writ of certiorari, record, and brief have been filed and proof by affidavit of notice thereof under paragraph 3 of rule 38 of the Supreme Court be given, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

28 [Clerk's certificate to foregoing transcript omitted in printing.]

29 Supreme Court of the United States

Order allowing certiorari

Filed February 24, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] File No. 34687. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 556. Noah Crooks, collector of internal revenue, petitioner, vs. Benjamin Harrelson et al. Petition for writ of certiorari and exhibit thereto. Filed January 3, 1930. File No. 34687.

FILE COPY

FILED
JAN 3 1930
CHARLES ELMORE CROPLEY
CLERK

No. ~~556~~ 24

In the Supreme Court of the United States

OCTOBER TERM, 1929

NOAH CROOKS, COLLECTOR OF INTERNAL REVENUE,
PETITIONER

v.

BENJAMIN HARRELSON ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

INDEX

	Page
Petition:	
Statement	1
Specification of error to be urged	3
Reasons for granting the writ	3
Brief in support of the petition:	
Opinions below	5
Jurisdiction	5
Question presented	5
Statute and Regulation involved	5
Statement	8
Argument	8
Conclusion	17

CITATIONS

Cases:	
Bartlett et al., Executors, v. *Commissioner*, 16 B. T. A. 811	3
Beard v. *Lofton*, 102 Ind. 408	14
Burk-Waggoner Assn. v. *Hopkins*, 269 U. S. 110	17
Leakey v. *Maupin*, 10 Mo. 368	14
Steedman v. *United States*, 63 Ct. Cls. 226, certiorari denied, 275 U. S. 528	3, 10
Thomson v. *Tracy*, 60 N. Y. 174	14
United States v. *Field*, 255 U. S. 257	9
United States v. *Robbins*, 269 U. S. 315	17
Statutes:	
Revenue act of 1918, c. 18, sec. 402, 40 Stat. 1057, 1097	5–7
Miscellaneous:	
Bouvier's Law Dictionary (1928 ed.), pp. 294–295	14
House Report No. 922 (64th Cong., 1st sess., p. 5)	14
Senate Report No. 617 (65th Cong., 3d sess., p. 41)	15
2 Schouler on Wills (5th ed.), sec. 1495, p. 1583	14
Treasury Regulations 37, article 12	7, 8, 17
Treasury Regulations No. 63, article 11	10

In the Supreme Court of the United States

OCTOBER TERM, 1929

No. —

NOAH CROOKS, COLLECTOR OF INTERNAL REVENUE, petitioner

v.

BENJAMIN HARRELSON ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

PETITION

The Solicitor General, on behalf of the Collector of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit entered in the above entitled case on October 3, 1929, affirming the judgment of the District Court of the United States for the Western District of Missouri.

STATEMENT

William H. Harrelson, of Kansas City, Missouri, died testate on March 8, 1920 (R. 2), the owner of certain real property situate in that State (R. 3).

Respondents were the sole distributees and devisees of his estate. (R. 2.) In making the return for Federal estate tax purposes, the executors of William H. Harrelson included the value of the real property in his gross estate. Thereafter they filed a claim for refund alleging that under the laws of the State of Missouri real property owned by decedent at the time of his death was not subject to the payment of the expenses of the administration of his estate, and therefore that the value of the real property was not lawfully included in decedent's gross estate. The Commissioner rejected the claim and respondents brought this action to recover that portion of the Federal estate tax which was imposed by reason of the inclusion of the value of the real property in decedent's gross estate. (R. 3.)

The petition demanded judgment for the sum of $37,762.20 with interest at the rate of six per centum per annum from July 24, 1922. (R. 4–5.) The Collector demurred to the petition. (R. 7.) The District Court overruled the demurrer on December 14, 1928, and granted judgment in the amount prayed for to these respondents. (R. 7.) The Collector thereupon appealed to the Circuit Court of Appeals for the Eighth Circuit. (R. 9.) That court affirmed the judgment of the District Court. (R. 21.)

SPECIFICATION OF ERROR TO BE URGED

The Circuit Court of Appeals erred:

In holding that the value of the real estate of a decedent in the State of Missouri should not be included in the measure of decedent's gross estate for the purpose of computing the Federal estate tax under the provisions of Section 402 of the Revenue Act of 1918.

REASONS FOR GRANTING THE WRIT

The decision of the Circuit Court of Appeals is in conflict with the decision of the Court of Claims in the case of *Steedman* v. *United States,* 63 C. Cls. 226, certiorari denied, 275 U. S. 528. It is also contrary to the decision of the United States Board of Tax Appeals in *Bartlett et al., Executors,* v. *Commissioner,* 16 B. T. A. 811. The effect of the decision is to produce inequality as between taxpayers in the incidence of the Federal Estate Tax, based upon local rules of property, which it is believed was not the intention of Congress. This case is one of a considerable number now pending in District Courts of the United States in Missouri, which involve large amounts. The question arises under the Revenue Acts of 1916, 1918, 1921, and 1924, and the Treasury Department is in need of an authoritative rule for its guidance in the administration of those Acts.

Wherefore, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Circuit Court of Appeals for the Eighth Circuit should be granted.

CHARLES E. HUGHES, JR.,
Solicitor General.

JANUARY, 1930.

BRIEF IN SUPPORT OF THE PETITION

OPINIONS BELOW

The opinion of the District Court of the United States for the Western District of Missouri (R. 10–12) is reported in 28 F. (2d) 510. The opinion of the United States Circuit Court of Appeals (R. 14) is not yet reported.

JURISDICTION

The judgment of the United States Circuit Court of Appeals was entered October 3, 1929. (R. 21.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

May the value of real property situate in the State of Missouri be included in the measure of the gross estate of a decedent who died the owner thereof under the provisions of Section 402 of the Revenue Act of 1918?

STATUTE AND REGULATION INVOLVED

The Revenue Act of 1918, c. 18, 40 Stat. 1057, 1097:

> SEC. 402. That the value of the gross estate of the decedent shall be determined

by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate;

(b) To the extent of any interest therein of the surviving spouse, existing at the time of the decedent's death as dower, courtesy, or by virtue of a statute creating an estate in lieu of dower or courtesy;

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act), except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;

(d) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their

joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent;

(e) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, except in case of a bona fide sale for a fair consideration in money or money's worth; and

(f) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life.

Treasury Regulations 37, Article 12, relating to Section 402 (a):

Character of interest included.—This provision is designed to include all property interests of the decedent, of whatever character. It is the commonest form of taxable transfer. As a basis for tax, there must be an actual, beneficial ownership in the decedent, not a bare legal title, or one held in trust. Thus, property actually devoted to religious or charitable purposes, and placed in the name of an individual solely for convenience in administration, is not included in his gross estate. The

statute also includes only property rights existing in the decedent in his lifetime and passing to his estate. It consequently does not include a right which came into existence only after the decedent's death, such as a cause of action by statute for causing the death. The proceeds of such a cause of action should not be included in the gross estate, whether payable generally to the estate or to some specified class of persons, such as the widow or children.

The value of a vested remainder should be included in the gross estate. Nothing should be included, however, on account of a contingent remainder where the contingency does not happen in the lifetime of the decedent, and the interest consequently lapses at his death. Nor should anything be included on account of a life estate in the decedent. There should be included, however, the value of an annuity payable to the decedent upon the life of a third person who survives him, and the value of an estate for the life of a person other than the decedent. For rules as to valuing such annuities and illustrations, see Article 20.

STATEMENT

A statement of the case and the error relied upon will be found in the petition.

ARGUMENT

The Circuit Court of Appeals held that in drawing the provisions of Section 402 of the Revenue Act of 1918 it was the intention of Congress that real property should be included in the measure

of a decedent's gross estate for estate-tax purposes only in case all the conditions expressed in subdivision (a) thereof were satisfied. It held that real property in the State of Missouri was not subject to the payment of administration expenses, and hence that such property could not be included in the gross estate.

It must be recognized that the court's construction of Section 402 (a) finds support in the language of this Court, albeit unnecessary to the decision, in *United States* v. *Field,* 255 U. S. 257, 262, in which, in holding that property passing under a testamentary execution of a power of appointment could not be included in the gross estate under Section 202 of the Revenue Act of 1916, which did not, as does the Revenue Act of 1918, include any subdivision applying specifically to that situation, it said:

> The conditions expressed in clause (a) are to the effect that the taxable estate must be (1) an interest of the decedent at the time of his death, (2) which after his death is subject to the payment of the charges against his estate and the expenses of its administration, and (3) is subject to distribution as part of his estate. These conditions are expressed conjunctively; and it would be inadmissible, in construing a taxing act, to read them as if prescribed disjunctively. Hence, unless the appointed interest fulfilled all three conditions, it was not taxable under this clause.

Following the decision in the *Field case,* this construction was adopted by the Treasury Department (see Regulations 63, Article 11, approved by the Secretary of the Treasury July 27, 1922) under the Revenue Act of 1921, Section 402 of which was identical with the corresponding section of the 1918 Act.

On the other hand, reading Title IV of the Revenue Act of 1918, imposing the estate tax, as a whole, it is difficult to believe that Congress intended that, in a statute designed to be of general and uniform application, the inclusion in the gross estate of real property owned by a decedent at his death should depend on whether under the laws of a particular State it was or was not subject to the payment of administration expenses. The opening language of Section 402 clearly indicates that Congress intended to include in the gross estate all the decedent's property, and an intention to exclude therefrom any real property absolutely owned by him at the time of his death should not be implied from ambiguous language.

This was the view taken by the Court of Claims in *Steedman* v. *United States,* 63 C. Cls. 226, which reached a result as to the inclusion of Missouri real estate in the gross estate exactly opposite to that of the court below in the instant case. The Court of Claims said (pp. 233–234):

> The plain purpose of Congress as disclosed by the first part of section 402 was to sub-

ject to taxation "all of the estate" of a decedent to the full extent of his interest therein at the time of his death, whether real or personal, tangible or intangible, and wherever situated.

What the qualification, "which is subject to," was expected to exclude it is difficult to see. It is not reasonable to hold that Congress intended or had in mind the possibility of the exclusion from taxation of all real estate of a decedent where a statute of the State in which it was located did not specifically grant the right to sell it for the payment of the expenses of administration, or where a court of such State had held that under the existing statute it could not be subjected to sale for such purpose; that is to say, it is unreasonable to hold that Congress intended to exempt from taxation the real estate of a decedent in any of the States where the statute of the State did not specifically authorize the sale of it for the payment of expenses of administration. If each of the States had no such statute, all real estate would be exempt, and if in one State there was such a statute, the real estate would be taxable, and in another, where there was none, it would not be taxable, thus creating an inequality in taxation and a discrimination in favor of the States that have not passed such a statute.

The case of *United States* v. *Field, supra,* under the facts, we do not think controlling here.

It is presumed that Congress knew that under the common law real estate could not

be sold by a probate court for the payment of debts or administration expenses. To hold that it intended to exclude from taxation all real estate or interest therein which was not subject to the payment of charges against the estate or expenses of administration and subject to distribution, unless specially allowed and jurisdiction given to the courts by State statutes, would be to hold that Congress included all real estate as subject to taxation and then provided for the possibility of all of it being excluded and exempted.

It is an established rule of construction that an act must be read as a whole with a view to ascertaining the real purpose of Congress, with the assumption of a reasonable and intelligent purpose on its part, and that no construction should be given to an act or a limitation thereof which would do violence to the general purpose of the act and render it futile or absurd. It is the duty of the court to so construe an act as to accomplish its general purpose and to enforce it in conformity with that purpose and within the reason of the act.

The construction of Section 402 by the Circuit Court of Appeals in the instant case would, we submit, lead to absurdities. The court holds that real estate of which the decedent died seized is not to be included in his gross estate unless it is by the law of the State "subject to the payment of the charges against his estate and the expenses

of its administration, and is subject to distribution as part of his estate." No such conditions are expressed in any of the other subdivisions of the section, though they clearly relate to real as well as personal property. Under subdivision (c), if a decedent has prior to death transferred Missouri real property in contemplation of death, it is to be included as part of his gross estate, although, according to the construction of the court below, the same real property would not have been so included if he had owned it at his death. Under subdivision (d) if Missouri real property is owned by a decedent in joint tenancy it is included in the gross estate, although, under the opinion of the court below, it would not be included if he had owned it outright. Under subdivision (b) the dower or courtesy interest of the surviving spouse would be included in the gross estate of the decedent, although the decedent's own interest would not be if the decision below is correct.

A construction of the statute which leads to such results should be avoided, if that be possible without doing violence to its language. It is submitted that the language is not so clear and unambiguous as to require that construction. The qualification in subdivision (a) "which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his

estate" can not be literally applied to real property without attributing to Congress an inartificial use of language. The third condition prescribed by Section 402(a) is that the interest to be included must be "subject to distribution as part of his [decedent's] estate." It is axiomatic that only personal property is "subject to distribution." *Leakey* v. *Maupin,* 10 Mo. 368, 373; 2 Schouler on Wills (5th Ed.), Section 1495, p. 1583; Bouvier's Law Dictionary (1928 Ed), pp. 294–295; *Thomson* v. *Tracy,* 60 N. Y. 174, 181; *Beard* v. *Lofton,* 102 Ind. 408. Moreover, Congress must be presumed to have known that under the common law real property was not liable either for the payment of debts or for administration expenses. It is not reasonable to suppose that Congress in enacting a law of general application throughout the United States intended to discriminate in favor of taxpayers owning real property in States which retained the common law rule and against those whose real estate interests were in States which had modified it.

The Congressional Reports on the corresponding section of the Revenue Act of 1916 (House Report No. 922, 64th Congress, 1st Session, p. 5) throw little light on the question. In drawing the instant Act, however, Congress added 402 (b), providing that the value of the gross estate should include "any interest therein of the surviving spouse, existing at the time of the decedent's death as dower,

curtesy," etc. The report of the Committee on Finance, Senate No. 617, 65th Congress, 3rd Session, p. 41, very significantly explains this as follows:

> Section 402 of this bill, which takes the place of section 202 of the original act, has been revised so as to contain a provision specifically including in the gross estate dower, curtesy, or any estate created in lieu of dower or curtesy. The distinction between dower and curtesy interest and property passing to wife or husband by will or intestate succession is technical rather than real, at least in the consideration of the question as to whether they should be subject to estate tax. The proposed amendment is for the purpose of making it clear that such interests are to be included.
>
> It was the intention of the framers of the original act that dower, curtesy, and estates created in lieu of dower or curtesy should be included in the gross estate, and your committee believes that the Treasury Department has correctly ruled in requiring them to be so included. Since a dispute has arisen with reference to this question, your committee deems it advisable to provide specifically that these estates shall be included in the gross estate.

As neither dower, curtesy, nor any estate created in lieu of dower or curtesy would have been included under the language of subdivision (a) of Section 202 of the Revenue Act of 1916 (which is

identical with that of the same subdivision of Section 402 of the 1918 Act) as construed by the court below, the statement of the Committee necessarily means that the court's construction of the section was not according to the intention of its framers.

The Court of Claims also places its decision upon the ground that under the law of Missouri real property is "subject to" the payment of administration expenses. The court said (63 C. Cls. p. 232):

> Section 402, *supra,* does not use the word "liable"; it uses the words "subject to." "Subject to" does not necessarily mean "liable for." It may be said that where land is liable for sale for the payment of debts, it is subject to the payment of debts, but the converse is not necessarily true. Real estate may be under certain conditions "subject to" the payment of expenses of administration and yet not liable to sale therefor; that is, it may be under the contingency of or exposed to payment of administrative expenses and thus "subject to" the payment.
>
> Real estate may be sold under the Missouri statute for the payment of debts, and, having been sold, because the personal estate was not sufficient to pay the debts and the administration expenses, the latter could be paid, under the decision of the court of Missouri, out of the fund realized from the sale. *Howell* v. *Jump,* 140 Mo. 441. If the proceeds from the sale of real estate for payment of debts may be used under certain con-

tingencies for the payment of administration expenses, it is in such a case "subject to" the payment of the expenses of administration.

Whether the Court of Claims was correct in its interpretation of the Missouri law is not material unless it was the intention of Congress that the law of the different States should control the question whether real property situated therein should be included in the gross estate.

We submit that such an intention should not be imputed to Congress. Subdivisions (b), (c), (d), (e), and (f) draw into the gross estate certain other property which the decedent at his death either did not own at all or of which he had only limited ownership. In either case, however, decedent's death served as the generating cause of transfer for the purpose of bringing the property within the measure of the taxable estate. These provisions are most comprehensive, and evidence sedulous care to include all property which could possibly be regarded as having undergone a taxable transfer by death. In view of this manifest general purpose, it is not reasonable to suppose that Congress intended by subdivision (a) to allow any property interest which was owned outright by the decedent to escape. (See Regulations 37, Article 12, *supra,* p. 7). If it was the intent to reach all the decedent's real property that intent is not to be thwarted by particular rules of property in the several States. *United States* v. *Robbins,* 269 U. S.

315, 327; *Burk-Waggoner Association* v. *Hopkins*, 269 U. S. 110.

CONCLUSION

It is submitted that the construction of the statute by the Court of Claims and the Board of Tax Appeals is preferable to that the Circuit Court of Appeals in the instant case. But whichever view is correct, we submit that the existing conflict of decisions makes this a proper case for review.

Respectfully,

CHARLES E. HUGHES, Jr.,
Solicitor General.
G. A. YOUNGQUIST,
Assistant Attorney General.
SEWALL KEY,
JOHN VAUGHAN GRONER,
Special Assistants to the Attorney General.

JANUARY, 1930.

U. S. GOVERNMENT PRINTING OFFICE: 1930

FILE COPY

Office Supreme Court
FILED
OCT 18 19
CHARLES ELMORE C
C.

No. 24

In the Supreme Court of the United States

OCTOBER TERM, 1930

NOAH CROOKS, COLLECTOR OF INTERNAL REVENUE,
PETITIONER

v.

BENJAMIN HARRELSON ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes	2
Statement	2
Specification of error to be urged	4
Summary of argument	4
Argument:	
I. Section 402 of the revenue act of 1918, relating to the computation of the value of the gross estate, should be construed to provide for the inclusion of the value of all real estate in the United States in which the decedent had an estate of inheritance in his own right at the time of his death	8
II. Even if section 402 should not be construed as broadly as we suggest above, it should be held to provide for the inclusion in the gross estate of those interests of the decedent in real estate which under the law of the state in which it is situated may be used—either directly or indirectly—to defray expenses of administration of the estate	20
III. Under the law of Missouri, real estate of a decedent can, under some circumstances, be applied for the payment of expenses of administration	23
Conclusion	27
Appendix A: United States Statutes, Treasury Department regulations, and congressional committee reports	28–40
Appendix B: Summary of state statutes on liability of real estate for administration expenses	41–46
Appendix C: Missouri statutes and discussion of Missouri statutes and decisions	47–56

CITATIONS

Cases:	
Bartlett v. *Commissioner*, 16 B. T. A. 811	7, 20–21, 24–25, 54
Barry, succession of, 130 La. 401	43
Beadle v. *Steele*, 86 Ala. 413	45
Beatty v. *Stapleton*, 110 Ga. 580	45
Boston & M. R. R. Co. v. *United States*, 265 Fed. 578, certiorari denied, 253 U. S. 577	14

Cases—Continued.

	Page
Brewster v. *Gage*, 280 U. S. 327	17
Candee v. *Candee*, 87 Conn. 85	41
Carbon Steel Co. v. *Lewellyn*, 251 U. S. 466	15
Chambers' Adm. v. *Wright's Heirs*, 40 Mo. 482	52
Chapman, In re, 166 U. S. 661	15
Collins v. *Paepcke-Leicht Lumber Co.*, 174 Ark. 81	43
Crenshaw v. *Bentley*, 31 Mo. App. 75	53
Crow v. *Lutz*, 175 Mo. App. 427	53
Dayton Brass Castings Co. v. *Gilligan*, 267 Fed. 872	23
Dildine v. *DeHart*, 293 Mo. 393	51, 52
Dinning v. *Conn's Adm'r.*, 124 Ky. 623	10
Elstroth v. *Dickmeyer*, 88 Mo. App. 418	54
Elstroth v. *Young*, 94 Mo. App. 351	52, 54, 55
Farrar v. *Dean*, 24 Mo. 16	52
Fleischmann Construction Co. v. *United States*, 270 U. S. 349	15
Flowers v. *Reece*, 92 Ark. 611	43
Gilbreath v. *Cosgrove*, 185 S. W. 1118	26
Griffith v. *Witten*, 252 Mo. 627	26
Hall v. *Bank*, 145 Mo. 418	51
Holy Trinity Church v. *United States*, 143 U. S. 457	15
Howell v. *Jump*, 140 Mo. 442	54, 55
Ibox, succession of, 144 La. 813; 81 So. 326	44
Knowlton v. *Moore*, 178 U. S. 41	13
Kohlsaat v. *Murphy*, 96 U. S. 153	15
Langston v. *Canterbury*, 173 Mo. 122	52, 56
Leakey v. *Maupen*, 10 Mo. 368	10
Lloyd, In re Estate of, 44 Mo. App. 670	55, 56
Long v. *Palmer, Smith & Co.*, 16 Pet. 65	23
Lucas v. *Alexander*, 279 U. S. 573	14
Maryland Casualty Co. v. *United States*, 251 U. S. 342	17
Mays v. *Rogers*, 52 Ark. 320	43
Motiers Estate, In re, 7 Mo. App. 514	55, 56
National Lead Co. v. *United States*, 252 U. S. 140	17
New York Trust Co. v. *Eisner*, 256 U. S. 345	13
Northern Commercial Co. v. *United States*, 217 Fed. 33	23
Nyberg v. *United States*, 66 C. Cls. 153, certiorari denied, 278 U. S. 646	19
Patton v. *Brady*, 184 U. S. 608	13
Personette v. *Johnson*, 40 N. J. Eq. 173	45
Phelan v. *Elbin*, 84 Conn. 208	41
Pinnacle Co. v. *Popst*, 54 Colo. 451	43
Plains L. & I. Co. v. *Lynch*, 38 Mont. 271	41
Presbyterian Church v. *McElhinney*, 61 Mo. 540	52
Ritchey v. *Withers*, 72 Mo. 556	55, 56
Rizzotto v. *Grima*, 164 La. 1; 113 So. 658	43
St. Louis Nat. Bank v. *Field*, 156 Mo. 306	51
State v. *Holtcamp*, 245 Mo. 655	51

Cases—Continued. Page

Steedman v. *United States*, 63 C. Cls. 226, certiorari denied, 275 U. S. 528 ..... 6, 19, 55
Taylor v. *Crook, Admr.*, 136 Ala. 354 45
Teverbaugh v. *Hawkins*, 82 Mo. 180 52
Thomson v. *Tracy*, 60 N. Y. 174 10
Thompson v. *Thompson*, 217 S. W. 863 53
Trahan, succession of, 118 La. 762; 43 So. 400 44
Tyler v. *United States*, 281 U. S. 497 15
Union Central Life Insurance Co. v. *Skipper*, 115 Fed. 69 23
Union Insurance Co. v. *United States*, 6 Wall. 759 23
United States v. *Burr*, 159 U. S. 78 15
United States v. *Childs*, 266 U. S. 304 14
United States v. *Delaware & Hudson Co.*, 213 U. S. 366 14
United States v. *Field*, 255 U. S. 257 ..... 17, 18
United States v. *Fisk*, 3 Wall. 445 22–23
United States v. *Provident Trust Co.*, 281 U. S. 497 15
United States v. *Standard Brewery*, 251 U. S. 210 14
United States v. *Waite*, 33 F. (2d) 567, certiorari denied, 280 U. S. 608 15

United States Constitution:
Art. I, sec. 8 13

United States Statutes:
Revenue Act of 1916, c. 463, 39 Stat. 756, 777–778—
Sec. 202 28
Revenue Act of 1918, c. 18, 40 Stat. 1057, 1097–1098—
Sec. 402 29
Revenue Act of 1921, c. 136, 42 Stat. 227, 278—Sec. 402 30
Revenue Act of 1924, c. 234, 43 Stat. 253, 304—Sec. 302 30
Revenue Act of 1926, c. 27, 44 Stat. 9, 70—Sec. 302 31

Missouri statutes:
Revised Statutes, 1919—
Sec. 141 47
Sec. 142 47
Sec. 145 47
Sec. 146 47–48
Sec. 147 48
Sec. 148 48
Sec. 149 48
Sec. 165 49
Sec. 181 49
Sec. 220 ..... 24, 50
Sec. 224 ..... 24, 50
Missouri Laws, 1921, p. 111 56

Treasury Department regulations:
Regulations 37—
Art. IV 31
Art. V 32

Treasury Department regulations—Continued. Page
Regulations 37 (1919 Revision)—
Art. 12 32–33
Art. 13 33
Regulations 37 (1921 Revision)—
Art. 12 33–34
Art. 13 33–34
Regulations 63—
Art. 11 34
Art. 12 34–35
Regulations 68—
Art. 10 35
Art. 11 35
Regulations 70 (1926 Edition)—
Art. 10 35
Art. 11 36
Regulations 70 (1929 Edition)—
Art. 10 36
Art. 11 36
Congressional committee reports:
House Report No. 922, 64th Cong., 1st sess., p. 5 36–37
Senate Report No. 793, 64th Cong., 1st sess., part 1, p. 3 .. 37
Senate Report No. 617, 65th Cong., 3d sess., pp. 41–42 37–39
House Report No. 1, 69th Cong., 1st sess., p. 15 40
Miscellaneous:
Sutherland, Statutory Construction (2d ed.), sec. 397 23

In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 24

NOAH CROOKS, COLLECTOR OF INTERNAL REVENUE, petitioner

v.

BENJAMIN HARRELSON ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the District Court for the Western District of Missouri (R. 7–9) is reported in 28 F. (2d) 510. The opinion of the Circuit Court of Appeals for the Eighth Circuit (R. 9–16) is reported in 35 F. (2d) 416.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered October 3, 1929. (R. 16–17.) The petition for certiorari was filed January 3, 1930. Certiorari was granted February 24, 1930. (R. 18.)

Jurisdiction is conferred upon this Court by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Should the value of real property situated in the State of Missouri be included in the measure of the gross estate of a decedent who died the owner thereof, under the provisions of Section 402 of the Revenue Act of 1918?

STATUTES INVOLVED

The statutes and regulations involved are set forth in Appendix A, *infra*, pp. 28–40.

STATEMENT

The following is a summary of the facts as alleged in the petition filed in the District Court and admitted by demurrer (R. 4):

On March 8, 1920, William H. Harrelson, of Kansas City, Missouri, died testate. At the time of his death he owned real estate situated in that state which then had a total value of $269,730. (R. 1, 2.) The respondents were the sole beneficiaries and distributees under his will. (R. 1.)

In the Federal estate tax return his executors included in the gross estate the value of this real property and reported a net estate of $2,137,204. (R. 2.) The Commissioner of Internal Revenue made an audit of the return, as the result of which the net estate was determined to be $2,279,068.28, including real estate valued at $269,730. The ex-

ecutors paid the estate tax of $200,569.58 assessed on this return, with interest. (R. 2.)

Thereafter the executors filed a claim for refund, alleging that under the laws of the State of Missouri real property owned by a decedent at the time of his death was not subject to the payment of the expenses of the administration of his estate, and hence that the value of the real property owned by the decedent at the time of his death was not properly included in his gross estate. The claim was rejected by the Commissioner. (R. 2.)

The petition demanded judgment for the sum of $37,762.20, with interest at the rate of 6% per annum from July 24, 1922. (R. 3.) The Collector demurred to the petition. (R. 4.) The District Court overruled the demurrer, and on December 14, 1928, as the Collector declined to plead further, it entered judgment for the plaintiffs for $37,762.20 plus interest. (R. 5.) The Circuit Court of Appeals for the Eighth Circuit affirmed the judgment (R. 16–17). This Court granted certiorari on February 24, 1930. (R. 18.)

Both of the courts below held in effect that real estate could not be included in computing the value of the gross estate unless it could, under the law of Missouri, be applied for the payment of expenses of administration. On the question of state law, they concluded that real estate of a decedent could not be sold for the payment of expenses of administration and the proceeds of land sold to pay

debts could not be lawfully used to pay expenses of administration. (See R. 8–9, 13, 15.)

SPECIFICATION OF ERROR TO BE URGED

The Circuit Court of Appeals erred—

In holding that the value of the real estate of a decedent in the State of Missouri should not be included in the measure of decedent's gross estate for the purpose of computing the Federal estate tax under the provisions of Section 402 of the Revenue Act of 1918.

SUMMARY OF ARGUMENT

I

Section 402 of the Revenue Act of 1918, relating to the computation of the value of the gross estate, should be construed to provide for the inclusion of the value of all real estate in the United States in which the decedent had an estate of inheritance in his own right at the time of his death. The provisions of this section are comprehensive and evidence a purpose to include all property owned by the decedent absolutely at the time of his death which could possibly be regarded as having undergone a taxable transfer by his death.

Subparagraph (a) provides that property shall be included "to the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate." This language is obviously inartificial

and is loosely used. We submit that it was intended to define the character of interests to be included—i. e., those interests in property which from their nature are capable of being applied to the payment of charges against the estate and the expenses of administration and which are capable of transfer to the beneficiaries of the estate, in contrast to life interests, contingent remainders, property held by the decedent in trust for others, etc. Although at common law real property was not liable for the payment of either simple contract debts or administration expenses, most states by 1918 had statutes making real estate liable for these charges under different conditions, and, of course, real estate could be made subject to such payments either by statute or by specific provision in wills.

It is not reasonable to suppose that Congress, in enacting a law of general application throughout the United States, intended to discriminate in favor of the estates of decedents who owned real property in states which retained the common-law rule and against those whose real estate was in states which had modified it. It is doubtful whether the statute, if construed to require such discrimination, would not violate the constitutional requirement of geographical uniformity in excise taxes throughout the United States, and this construction is therefore to be avoided where another construction is possible.

This construction is also to be avoided because it would thwart the general purpose of the section and would lead to absurd results, i. e., the exclusion of the value of real estate in which the decedent owned the entire interest outright at the time of his death, in spite of the inclusion of the value of dower or curtesy interests of the surviving spouse, the inclusion of part of the value of real estate held by decedent and another in joint tenancy or as tenants by the entirety, and the inclusion of the value of the real estate which the decedent had transferred in contemplation of death.

The construction for which we contend is that which was adopted in practice by the Treasury Department from the time of the enactment of the Revenue Act of 1916, which was the first Act to provide for the estate tax, and this construction was also adopted in regulations promulgated by the Secretary of the Treasury. After the adoption of this settled practice, Congress reenacted the provisions in question and thus gave evidence of its approval of that practice. These considerations seem to be more persuasive than the fact that in 1921, after the decision of this Court in *United States* v. *Field*, 255 U. S. 257, the Commissioner changed his regulations to conform to what he then understood to be the effect of that decision. That case, we submit, is not decisive of the instant case.

Steedman v. *United States*, 63 C. Cls. 226, certiorari denied, 275 U. S. 528, is directly in point, and supports the above contentions.

II

Even if Section 402 should not be construed as broadly as we suggest above, it should be held to provide for the inclusion in the gross estate of those interests of the decedent in real estate which, under the law of the state in which it is situated, may be applied, either directly or indirectly, to defray expenses of administration of the estate.

The language of subparagraph (a) obviously can not be construed to require that the real estate, to be included, must actually be applied to the payment of expenses of administration. And it would be unreasonable to construe the language as requiring that the law of the state should permit its sale for expenses of administration under all circumstances. We submit that the strictest construction of which it is susceptible would be satisfied if the real estate could, as a practical matter, be applied, either directly or indirectly, to the payment of expenses of administration under any circumstances. The decision in *Bartlett* v. *Commissioner,* 16 B. T. A. 811, supports this contention.

III

Under the law of Missouri, real estate of the decedent can, under some circumstances, be applied to payment of expenses of administration.

No statute permits real estate there to be sold merely to pay administration expenses. But an executor or administrator, upon application to the court, can obtain permission to sell real estate to

pay debts or legacies if the personal estate is insufficient. And when such a sale is made, the expenses of the sale and a commission on the proceeds of the sale given by statute to the executor or the administrator for making the sale are first payable out of the proceeds of the estate. This is an expense of administration. Moreover, it would seem that when a sale is made the proceeds may be applied for other expenses of administration. Ordinarily in Missouri expenses of administration have precedence over debts and legacies. Real estate may be sold to pay debts and legacies if the personal estate has been consumed by administration expenses; and consequently, as a practical matter, the real estate may be sold because of administration expenses. The payment of debts and legacies and the payment of administration expenses are thus very closely related. Moreover, a testator by express provisions of his will may subject real estate to payment of administration expenses.

ARGUMENT

I

SECTION 402 OF THE REVENUE ACT OF 1918, RELATING TO THE COMPUTATION OF THE VALUE OF THE GROSS ESTATE, SHOULD BE CONSTRUED TO PROVIDE FOR THE INCLUSION OF THE VALUE OF ALL REAL ESTATE IN THE UNITED STATES IN WHICH THE DECEDENT HAD AN ESTATE OF INHERITANCE IN HIS OWN RIGHT AT THE TIME OF HIS DEATH

Section 402 of the Revenue Act of 1918, with its six subparagraphs, designated as "(a)" through

"(f)," inclusive, is printed in the Appendix, pp. 29–30, *infra*. It provides:

> That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> (a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate;

and to the extent of the interests and property designated in five other subparagraphs. These other subparagraphs provide for the inclusion of the interest of the surviving spouse as dower, courtesy, and the like; property of which the decedent has made a transfer in contemplation of or intended to take effect in possession or enjoyment at or after his death; the interest of the decedent in property held jointly or by tenants by the entirety; property passing under a general power of appointment exercised by the decedent; and certain insurance on the decedent's life. The provisions are most comprehensive and evidence sedulous care to include in the gross estate all property which could be regarded as having undergone a taxable transfer by death. It is obvious that Congress intended to include real estate, inasmuch as the introductory sentence mentioned real estate and subparagraph (b) expressly provided for the in-

clusion of the interest "of the surviving spouse existing at the time of the decedent's death as dower, courtesy, or by virtue of a statute creating an estate in lieu of dower or courtesy." And we submit that an intention to exclude from the gross estate any real property absolutely owned by the decedent at the time of his death should not be imputed to Congress in the absence of explicit language to this effect.

The language of subparagraph (a), which the respondent and the courts below construed as operating to exclude all real estate in Missouri, is inartificial and is loosely used.[1] We contend that, for various reasons mentioned below, it should not be given the narrow interpretation adopted by the Circuit Court of Appeals in this case.

We submit that subparagraph (a) was intended merely to define the character of interests to be included, i. e., those interests in property which from their nature are capable of being applied to the payment of charges against the estate and the

---

[1] Thus it provides that the property to be included must be "subject to distribution as part of his estate." The only property which is subject to *distribution* as part of an estate, in the accurate meaning of that word, is personal property. The Circuit Court of Appeals recognized this. (R. 11.) See also *Dinning* v. *Conn's Administrator*, 124 Ky. 623, 627; *Leakey* v. *Maupen*, 10 Mo. 368, 373; *Thomson* v. *Tracy*, 60 N. Y. 174, 180–181. Respondents did not argue in the court below that subparagraph (a) should have the effect of excluding all real estate, and the court below said: "Such a result plainly could not have been intended by Congress." (R. 12.)

expenses of administration and which are capable of transfer to the beneficiaries of the estate, in contrast to estates for the decedent's life, contingent remainders, property held by the decedent in trust for others, etc. It is notable that the conditions or descriptive words set forth in subparagraph (a) do not appear in any of the other subparagraphs of the section, although most of those subparagraphs relate to real, as well as to personal, property. If the interest is one which is normally or generally subject to the payments mentioned and is susceptible of transfer to the beneficiaries of the estate, we contend that it comes within the meaning of the language in question.

Although at common law real estate was not liable for the payment either of ordinary debts of the decedent or administration expenses, most states have statutes making real estate liable for these charges under different conditions. As appears from the compilation of statutes in Appendix B, pp. 41–46, *infra,* in 1920 (the year of the death of Harrelson), the statutes of sixteen states provided for the sale of real estate to pay administration expenses, and the statutes of twenty-two other states made provision for the sale of real estate to meet payment of such expenses after personal property had been exhausted. In the remaining ten states, the statutes appear to have made provision for the sale of real estate to meet the payment of debts, if the personal estate is insufficient, but not the payment of administration expenses. It should also

be borne in mind that wills often provide that real estate may be sold for the payment of administration expenses.

Nowhere in subparagraph (a) or in any other part of Section 402 is there express provision that the test as to whether any particular kind of property is to be included is to be found in the law of the state in which it is located. The general terms of the provisions of subparagraph (a) of Section 402 are in marked contrast to the explicit language of the provisions for deductions in Section 403 of the same Act, which provides that the value of the net estate shall be determined by deducting from the value of the gross estate *inter alia*—

> such amounts for funeral expenses, administration expenses, claims against the estate * * * as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered,

with certain designated exceptions. In view of this specific reference to state laws, the absence of specific reference to state law in Section 402(a) is especially significant.

We submit that Congress did not intend that the Commissioner, in computing the value of the gross estate, should be required to consult the statutes and the decisions of the state in which the real estate is located in order to determine whether or not the value of the real estate should be included in computing the estate tax. Real estate in Missouri is the same class of property as real es-

state in other states, and if it is not subjected to the payment of administration expenses it is only because the Missouri legislature has not seen fit so to provide. Under the construction adopted by the court below, it would seem that the legislature of any state at any time could remove all real estate within its borders from liability to the Federal estate tax.

It is not reasonable to suppose that Congress, in enacting a law of general application throughout the United States, meant to discriminate in favor of the estates of decedents who owned real estate in states which retained the common law rule as to the liability of real estate for administration expenses and against those whose real estate was in states which had modified that rule.

There is grave question whether the statute, if construed to require such discrimination, would not violate the constitutional requirement [2] of uniformity in excise taxes throughout the United States. The uniformity required by this clause is geographical; and it seems very doubtful whether its requirement would be met by a statute taxing real estate in some states while exempting the same class of property located in other states. *Knowlton* v. *Moore,* 178 U. S. 41, 106; *Patton* v. *Brady,* 184 U. S. 608, 622. It is an established principle

[2] Article I, Sec. 8, of the Constitution provides that "all Duties, Imposts, and Excises shall be uniform throughout the United States." The estate tax is an excise tax. *New York Trust Co.* v. *Eisner,* 256 U. S. 345, 349.

of statutory construction, as stated by this Court in *United States* v. *Delaware & Hudson Co.,* 213 U. S. 366, 408, that—

> where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.

See also *United States* v. *Standard Brewery,* 251 U. S. 210, 220; *Lucas* v. *Alexander,* 279 U. S. 573, 577.

This Court in *United States* v. *Childs,* 266 U. S. 304, rejected a construction which would lead to a similar lack of uniformity as to interest allowable to the United States on income-tax payments, saying (p. 309):

> We are unable to concur. It makes the rate of interest that of a particular locality, differing with the locality—in New York, as said by the Government, 6%, in the middle West 8%, and on the Pacific coast 10%,—and abridges or controls a federal statute by a local law or custom, and takes from it uniformity of operation.

See also *Boston & M. R. R. Co.* v. *United States,* 265 Fed. 578 (C. C. A. 1st), certiorari denied, 255 U. S. 577, where it was said (p. 580):

> Under the logic of the fundamental and salutary rule of uniformity, unless a contrary intention clearly appears, statutes creating a system under which taxes are to be laid are generally, if not always, accepted as intending a system to work uniformly

> throughout the domain in which the law is to operate. Hence it follows that the argument that the force of an express provision of a federal statute should be controlled or abridged by a local state statute is wholly inadmissible.

Moreover, there is manifest incongruity in an interpretation which would tax dower and curtesy interests, real property held as joint tenant or tenant by the entirety, real property given away in contemplation of death, and real property passing under the exercise of a power of appointment, but would not tax real property held in fee simple.[3] A construction of a statute which leads to absurd results should be avoided. *Holy Trinity Church* v. *United States,* 143 U. S. 457; *In re Chapman,* 166 U. S. 661; *Kohlsaat* v. *Murphy,* 96 U. S. 153.[4]

---

[3] The Circuit Court of Appeals for the Eighth Circuit has held that a wife's statutory interest in her husband's estate under the Missouri law is required to be included in the gross estate. *United States* v. *Waite*, 33 F. (2d) 567, certiorari denied, 280 U. S. 608. The provision of subdivision (d) of Section 402 for including the value of the decedent's interest in property held in joint tenancy or as tenants by the entirety would seem clearly to apply to real estate regardless of whether or not the interest is subject to payment of administration expenses. See *United States* v. *Provident Trust Co.* (reported with *Tyler* v. *United States*), 281 U. S. 497.

[4] Even if the proper literal interpretation of the language were that for which respondents contend, the strict letter of the Act would have to yield to its evident spirit and purpose in order to give effect to the intent of Congress. *Fleischmann Construction Co.* v. *United States*, 270 U. S. 349, 360; *Carbon Steel Co.* v. *Lewellyn*, 251 U. S. 466, 505; *United States* v. *Burr*, 159 U. S. 78.

The construction for which we contend finds support in the practice of the Treasury Department. Articles 12 and 13 of its Regulations 37 (1919 revision), promulgated August 8, 1919, under the Revenue Act of 1918 (pp. 32–33, *infra*) showed clearly that the Department did not at that time construe subdivision (a) as a provision which might operate to exclude real estate possessed by a decedent from his gross estate. Article 12 declared that the provision "is designed to include all property interests of the decedent, of whatever character." Article 13 indicated that the only limitation as to the inclusion in gross estate of real estate owned by a decedent was as to real property situated outside of the United States, and expressly provided that with this exception real estate should be included "whether the property came into the possession and control of the executor or administrator or passed directly to heirs or devisees," thus indicating that, whether the real estate was or was not subjected to the payment of administration expenses, it was to be included in the gross estate. Although the regulations, adopted by the Treasury Department under the corresponding provision of the Revenue Act of 1916 (Articles IV and V of Regulations 37; pp. 31–32, *infra*) were not very definite, they do not indicate that this section was construed as a limitation of the kind contended for by the respondent.

As a matter of practice, the Treasury Department taxed all real estate owned by decedents at

the time of death without regard to whether such real estate was or was not subjected to the payment of administration expenses. This contemporaneous and continued construction of the provision by the Department charged with its administration is entitled to great weight. *Brewster* v. *Gage,* 280 U. S. 327; *Maryland Casualty Co.* v. *United States,* 251 U. S. 342. After the Treasury Department had followed this practice under the Revenue Act of 1916, Congress enacted Section 402(a) of the Revenue Act of 1918 and Section 402(a) of the Revenue Act of 1921, which were identical with Section 202(a) of the Revenue Act of 1916. This reenactment after the adoption of a settled practice under the Revenue Act of 1916 is evidence of legislative approval of that practice. *Brewster* v. *Gage, supra; National Lead Co.* v. *United States,* 252 U. S. 140.

After the decision in *United States* v. *Field,* 255 U. S. 257 (decided February 28, 1921), the Treasury Department in its regulations issued under the Revenue Act of 1921 laid down a test which it evidently conceived to be in accordance with the requirements of the *Field case.* Article 11 of Regulations 63 and Article 10 of Regulations 68 (pp. 34, 35, *infra*) provided that "the test which determines whether the value of a given interest is to be included" is "that the property, after death, shall be subject to: (1) payment of the charges against the estate; (2) payment of the expenses of administration; and (3) distribution as a part of the

estate." We submit that the independent and contemporaneous construction of the provision is entitled to more weight than the later interpretation based on what was conceived to be the effect of the decision in the *Field case.*

The new regulation is not very clear, but the Treasury Department has not construed it to require the exclusion of real estate in Missouri.[5]

The courts below placed considerable reliance upon certain language of this Court in the case of *United States* v. *Field,* 255 U. S. 257, concerning Section 202 (a) of the Revenue Act of 1916, c. 463, 39 Stat. 756, which is identical with Section 402 (a) of the Revenue Act of 1918, *supra,* here involved. There this Court said (p. 262):

> The conditions expressed in clause (a) are to the effect that the taxable estate must be (1) an interest of the decedent at the time of his death, (2) which after his death is subject to the payment of the charges against his estate and the expenses of its administration, and (3) is subject to distribution as part of his estate. These conditions are expressed conjunctively; and it would be inad-

[5] The claim for refund in the instant case was rejected on August 20, 1925. (R. 2.) The tax considered in *Steedman* v. *United States*, 63 C. Cls. 226, certiorari denied, 275 U. S. 528, was assessed in January, 1924, and November, 1924, and, of course, was collected. The tax considered in *Bartlett* v. *Commissioner*, 16 B. T. A. 811, was determined on March 9, 1926. We are informed that there are over fifty cases now pending in which the Commissioner has asserted the right to include real estate in Missouri under the different revenue acts.

> missible, in construing a taxing act, to read them as if prescribed disjunctively. Hence, unless the appointed interest fulfilled all three conditions, it was not taxable under this clause.

But the point actually decided in the *Field* case was that property passing under the execution of a testamentary power of appointment should not be included in the gross estate under Section 202 of the Revenue Act of 1916, which did not, as does Section 402 (e) of the Revenue Act of 1918 (*infra,* p. 30), include a specific provision taxing such a transfer. The case involved no question as to the application of state law or the meaning of the phrase "subject to the payment of the charges against his estate and the expenses of its administration." Consequently, this language does not support respondents' contention.

On the other hand, *Steedman* v. *United States,* 63 C. Cls. 226, certiorari denied, 275 U. S. 528, directly supports the above contentions of petitioner. In that case the court held that real estate in Missouri owned by the decedent at the time of his death should be included in computing the value of his gross estate under the provisions of Section 402 (a) of the Revenue Act of 1921, which is identical with the same section of the Revenue Act of 1918. We take issue with the contention of the respondents in their brief in opposition that this case has been repudiated by the Court of Claims in *Nyberg* v. *United States,* 66 C. Cls. 153, certiorari denied, 278 U. S. 646. The holding in that case was that a

widow's interest in her husband's estate under the Nebraska law was taxable under Section 402 (b) of the 1924 Act.

II

EVEN IF SECTION 402 SHOULD NOT BE CONSTRUED AS BROADLY AS WE SUGGEST ABOVE, IT SHOULD BE HELD TO PROVIDE FOR THE INCLUSION IN THE GROSS ESTATE OF THOSE INTERESTS OF THE DECEDENT IN REAL ESTATE WHICH UNDER THE LAW OF THE STATE IN WHICH IT IS SITUATED MAY BE USED—EITHER DIRECTLY OR INDIRECTLY—TO DEFRAY EXPENSES OF ADMINISTRATION OF THE ESTATE

The language of subparagraph (a) obviously can not be construed to require that the real estate, to be included, must actually be applied to the payment of expenses of administration. It would be unreasonable to construe the language as requiring that the law of the state should permit its sale for expenses of administration under all circumstances. We submit that the strictest construction of which it is susceptible would be satisfied if the real estate could, as a practical matter, be applied—either directly or indirectly—to the payment of expenses of administration under any circumstances.

Administration expenses, as a practical matter in the administration of an estate, are interwoven and connected with the payment of charges against the estate. The following language of the Board of Tax Appeals in *Bartlett* v. *Commissioner,* 16 B. T. A. 811, 817–818, is apt:

> When we consider that the phrase "subject to the payment of the charges against

his estate" is joined with the phrase "and the expenses of its administration" in one condition, we fail to see why land in Missouri does not fully comply with this condition. The two are so closely related that we can not have the former without the latter, and when the former does exist, the land is certainly subject to the payment of administration expenses. The position of the petitioner would require not only that the two parts of the condition be treated as separate and distinct conditions, but also that the words "subject to" be construed to mean "liable to be sold for." But as we read the statute, we do not understand that it means more than that the property must be of such a nature and have such a relation to the decedent's estate that the burden of administering the estate is incident and subject thereto.

A line of reasoning which would lead to a similar result is that the word "and" between the words "subject to the payment of the charges against his estate" and "the expenses of its administration" should be given the meaning of "and/or", so that the phrase in question will read: "which after his death is subject to the payment of the charges against his estate and/or the expenses of its administration." It is common knowledge that the use of the words "and" and "or" in the English language is often not exact. It is also a philological fact that we have no single word to express the idea "and/or." Accordingly, the word "and" is fre-

quently used when the idea which is sought to be expressed is really "and/or." The expression "and/or" has not yet been used in the Federal taxing statutes. But we contend that the word "and" in the phrase now in question was used in a sense which would have been more accurately expressed by the expression "and/or," or more simply by the word "or."

It is true that this Court in the *Field case, supra,* said that the conditions of subparagraph (a) are—

> (1) an interest of the decedent at the time of his death, (2) which after his death is subject to the payment of the charges against his estate and the expenses of its administration, and (3) is subject to distribution as part of his estate. These conditions are expressed conjunctively; and it would be inadmissible, in construing a taxing act, to read them as if prescribed disjunctively.

With this statement we are in full accord. We do not contend that these three conditions should be read disjunctively. Our sole concern is with the requiremets of the second of these conditions, which requirements the Court did not say should be construed conjunctively.

In *United States* v. *Fisk,* 3 Wall. 445, 447, this Court said:

> In the construction of statutes, it is the duty of the court to ascertain the clear in-

> tention of the legislature. In order to do this, courts are often compelled to construe "*or*" as meaning "*and,*" and again "*and*" as meaning "*or.*"

See also *Long* v. *Palmer, Smith & Co.,* 16 Pet. 65, 69; *Union Ins. Co.* v. *United States,* 6 Wall. 759, 764; *Union Central Life Ins. Co.* v. *Skipper,* 115 Fed. 69, 72 (C. C. A. 8th); *Northern Commercial Co.* v. *United States,* 217 Fed. 33, 36 (C. C. A. 9th); *Dayton Brass Castings Co.* v. *Gilligan,* 267 Fed. 872, 879; Sutherland, Statutory Construction (2d ed.) Sec. 397.

III

UNDER THE LAW OF MISSOURI REAL ESTATE OF A DECEDENT CAN, UNDER SOME CIRCUMSTANCES, BE APPLIED FOR THE PAYMENT OF EXPENSES OF ADMINISTRATION

At common law real estate could not be sold for the payment of expenses of administration. The common law is in effect in Missouri, except as modified by statute. No statute permits real estate there to be sold merely to pay administration expenses.

But, under the laws of Missouri, real estate of a decedent can, under some circumstances, be applied to the payment of expenses of administration. An executor or administrator, upon application to the court, can obtain permission to sell real estate to pay debts and legacies if the personal estate is insufficient. Missouri Revised Statutes (1919), Sec. 141 (*infra,* p. 47). When such a sale is made, the

executor is entitled to a commission of 5% on the proceeds of the sale. Missouri Revised Statutes (1919), Sec. 220 (*infra,* p. 50). This commission and the expenses of the sale are entitled to priority over the payment of debts against the estate. Missouri Revised Statutes (1919), Sec. 224 (*infra,* p. 50.)

Although it is true that a sale of real estate can not be made to pay the expenses of administration alone, when a sale has been made the proceeds may be applied in substance for the payment of expenses of administration. Real estate may be sold to pay debts and legacies if the personal estate has been consumed by administration expenses, and consequently, as a practical matter, the real estate may be sold because of administration expenses. The Board of Tax Appeals, considering this question in *Bartlett* v. *Commissioner,* 16 B. T. A. 811, 816, said:

> In the administration of an estate, among the expenses to be met before the payment of debts or legacies are administration expenses, and where there are debts or legacies to be satisfied, these administration charges will be paid out of the personal property before payment of debts or legacies from the real estate. But whether there will be considered sufficient personal property to satisfy the debts and legacies will be determined by taking into consideration the total liabilities for debts and legacies, together

with the amount due for administration expenses. And if there be not sufficient personalty to take care of all of these demands, but more than sufficient to take care of the administration expenses, resort will then be had to the realty to make up the deficiency. It may be said that under such circumstances administration expenses are being met out of the personal property and that the deficiency which is being met out of the realty relates only to debts and legacies, but it is undeniably true that the deficiency to be met out of the sale of realty is greater because the administration expenses have consumed a part of the personalty. By way of illustration, a man leaves only $10,000 worth of personalty, but also leaves $5,000 in real estate. His debts are $9,000, and the expenses of administration amount to $2,000. It is not believed that anyone would seriously question that under such circumstances real estate to the extent of $1,000 may and must be sold. Without the administration expenses no realty would be required to be sold. Whether we say that the administration expenses are paid out of personalty and the debts out of personalty and realty, or vice versa, would seem to be a mere choice of words and not material. The land can be sold only because the debt exists, but the sale is made on account of administration expenses in the same sense as it is of debts. * * *

Moreover, a testator by express provisions of his will may provide that real estate in Missouri shall be sold. When this is done there is, of course, an equitable conversion, so that real estate is treated from the time of the testator's death as though it were personal property (*Griffith* v. *Witten,* 252 Mo. 627), and the proceeds of the real estate are liable for the payment of administration expenses, as is other personal property. *Cf. Gilbreath* v. *Cosgrove,* 185 S. W. 1118. In such a situation real estate in Missouri is in fact subject to the payment of administration expenses.

The Missouri statutes and decisions on the question of the liability of real estate for the payment of administration expenses are examined and discussed in detail in Appendix C, *infra,* pp. 47–56. From this discussion we conclude that under the statutes of Missouri, when real estate is sold to meet the payments of debts or legacies the administration expenses should be satisfied from the proceeds prior to the satisfaction of the claims of creditors or legatees.

Accordingly we contend that real estate in Missouri satisfies the requirements of Section 402 (a) of the Revenue Act of 1918.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.
G. A. YOUNGQUIST,
Assistant Attorney General.
CLAUDE R. BRANCH,
SEWALL KEY,
HELEN R. CARLOSS,
Special Assistants to the Attorney General.
ERWIN N. GRISWOLD,
Attorney.
C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue,
WILLIAM T. SABINE, Jr.,
Special Attorney,
Bureau of Internal Revenue,
Of Counsel.

OCTOBER, 1930.

APPENDIX A

UNITED STATES STATUTES, TREASURY DEPARTMENT REGULATIONS, AND CONGRESSIONAL COMMITTEE REPORTS

UNITED STATES STATUTES

Section 202 of the Revenue Act of 1916, c. 463, 39 Stat. 756, 777–778, provided:

> SEC. 202. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated:
>
> (a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate.
>
> (b) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title; and
>
> (c) To the extent of the interest therein held jointly or as tenants in the entirety by

the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent.

For the purpose of this title stock in a domestic corporation owned and held by a nonresident decedent shall be deemed property within the United States, and any property of which the decedent has made a transfer or with respect to which he has created a trust, within the meaning of subdivision (b) of this section, shall be deemed to be situated in the United States, if so situated either at the time of the transfer or the creation of the trust, or at the time of the decedent's death.

Section 402 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1097–1098, provided:

SEC. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate;

(b) To the extent of any interest therein of the surviving spouse, existing at the time of the decedent's death as dower, courtesy, or by virtue of a statute creating an estate in lieu of dower or courtesy;

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at

any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act), except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;

(d) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent;

(e) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, except in case of a bona fide sale for a fair consideration in money or money's worth; and

(f) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life.

Section 402 (a) of the Revenue Act of 1921, c. 136, 42 Stat. 227, 278, and Section 302 (a) of the

Revenue act of 1924, c. 234, 43 Stat. 253, 304, are the same as Section 402 (a) of the Revenue Act of 1918 set out above.

Section 302 (a) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 70 (U. S. C. App., Title 26, Sec. 1094), provides:

> SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> (a) To the extent of the interest therein of the decedent at the time of his death;
>
> * * * * *

TREASURY DEPARTMENT REGULATIONS

Articles IV and V of Regulations 37, promulgated October 10, 1916, under the Revenue Act of 1916, provided in part as follows:

> ART. IV. The gross estate of a decedent, as defined in section 202, includes:
>
> (1) The entire estate of every kind, real, personal, and mixed, tangible and intangible property, coming into the hands of executors or administrators, or such as would legally come into their charge if executors or administrators were appointed, and which property would be subject to charges against the estate, expenses of administration, and distribution to the heirs or legatees. This would include insurance, not payable directly to a beneficiary named in the insurance contract, but passing as a part of the administered estate. It would include also the good will of claimant's business, if such good will possessed an actual monetary value.
>
> (2) All property transferred by decedent during his lifetime, but in contemplation

of, or intended to take effect at, his death. * * *

(3) Decedent's share in joint bank accounts or in any other property owned by decedent jointly with another or with others as tenants in entirety. Only such part of such property as can be shown never to have been owned by the decedent can be excluded from his gross estate.

ART. V. In the case of property of a decedent whose estate has no executor or administrator, all the property and interests of the decedent, including the interests described in paragraphs 2 and 3 above, will be aggregated to determine the gross estate.

Articles 12 and 13 of Regulations 37 (1919 revision), promulgated August 8, 1919, under the Revenue Act of 1918, provide in part:

ART. 12. CHARACTER OF INTERESTS INCLUDED.—This provision is designed to include all property interests of the decedent, of whatever character. It is the commonest form of taxable transfer. As a basis for tax, there must be an actual, beneficial ownership in the decedent, not a bare legal title, or one held in trust. Thus, property actually devoted to religious or charitable purposes, and placed in the name of an individual solely for convenience in administration, is not included in his gross estate. The statute also includes only property rights existing in the decedent in his lifetime and passing to his estate. It consequently does not include a right which came into existence only after the decedent's death, such as a cause of action by statute for causing the death. The proceeds of such a cause of action should not be included in the gross estate, whether payable generally to the estate or to some

specified class of persons, such as the widow or children.

The value of a vested remainder should be included in the gross estate. Nothing should be included, however, on account of a contingent remainder where the contingency does not happen in the lifetime of the decedent, and the interest consequently lapses at his death. Nor should anything be included on account of a life estate in the decedent. There should be included, however, the value of an annuity payable to the decedent upon the life of a third person who survives him, and the value of an estate for the life of a person other than the decedent. For rules as to valuing such annuities and illustrations, see Article 20.

ART. 13. SPECIFIC PROPERTY TO BE INCLUDED.—Real property owned by the decedent, when situated in the United States, should be included in the gross estate, whether the decedent was a resident or a nonresident, and whether the property came into the possession and control of the executor or administrator or passed directly to heirs or devisees. Real property not situated in the United States should not be included, whether the decedent was a resident or nonresident. Where the decedent was a resident, all personal property owned by him should be included, wherever situated. Where decedent was a nonresident, so much of his personal property as was actually situated in the United States at the time of his death should be included. For further discussion of the rules relating to the estates of nonresidents, see Article 60.

* * * * *

Regulations 37 (1921 revision), promulgated January 31, 1921, under the Revenue Act of 1918,

made no change in Articles 12 and 13 as set out above.

Articles 11 and 12 of Regulations 63, promulgated July 27, 1922, under the Revenue Act of 1921, provide:

> ART. 11. CHARACTER OF INTERESTS INCLUDED.—It is designed by the foregoing provision of the statute that there shall be included in the gross estate the value of all property of the decedent whether real or personal, tangible or intangible, the beneficial ownership of which was in the decedent in his lifetime, and which, upon his death, formed his estate.
>
> The test which determines whether the value of a given interest is to be so included, pursuant to the foregoing provision of the statute, is that stated therein which requires that the property, after death, shall be subject to: (1) payment of the charges against the estate, (2) payment of the expenses of administration, and (3) distribution as a part of the estate.
>
> * * * * *
>
> ART. 12. SPECIFIC PROPERTY TO BE INCLUDED.—The value of all real property situated in the United States, and owned by the decedent at the date of his death, should be included in the gross estate, whether the decedent was a resident or a nonresident, and whether the property came into the possession and control of the executor or administrator or passed directly to heirs or devisees. The value of real property situated outside the United States should not be included, except as otherwise provided in Articles 55, 56, and 57, where deductions from gross estate are claimed and the decedent was a nonresident. Where the de-

cedent was a resident, the value of all personal property owned by him should be included, wherever situated. Where decedent was a nonresident, the value of so much of his personal property as had its situs in the United States at the time of his death should be included, and the value of his entire gross estate, wherever situated, if deductions are claimed. (See Arts. 55, 56, and 57.) As to the situs of the personal property of nonresident decedents, see Article 53.

* * * * *

Articles 10 and 11 of Regulations 68, promulgated March 26, 1925, under the Revenue Act of 1924, are the same, so far as here material, as Articles 11 and 12 of Regulations 63, set out above.

Articles 10 and 11 of Regulations 70 (1926 edition), promulgated August 24, 1926, under the Revenue Act of 1926, provide in part as follows:

ART. 10. CHARACTER OF INTERESTS INCLUDED.—It is designed by the foregoing provision of the statute that there shall be included in the gross estate the value of all property of the decedent whether real or personal, tangible or intangible, the beneficial ownership of which was in the decedent at the time of his death.

Where the decedent died prior to 10.25 a. m., Washington, D. C., time, February 26, 1926, the test which determines that the value of a given interest is to be included in the gross estate under the provisions of subdivisions (a) of the corresponding sections of the Revenue Acts prior to that of 1926 is whether the property, after death, shall be subject to: (1) Payment of the charges against the estate; (2) payment of the expenses of administration; and (3) distribu-

tion as a part of the estate. This test is not applicable if the decedent died subsequent to the effective date of the Revenue Act of 1926.

ART. 11. SPECIFIC PROPERTY TO BE INCLUDED.—The value of all real property situated in the United States and owned by the decedent at the date of his death should be included in the gross estate, whether the decedent was a resident or a nonresident, and whether the property came into the possession and control of the executor or administrator or passed directly to heirs or devisees. Where the decedent was a resident, the value of all personal property owned by him should be included, wherever situated. Where the decedent was a nonresident, the value of so much of his personal property as had its situs in the United States at the time of his death should be included, and the value of his entire gross estate, wherever situated, should be disclosed, if deductions are claimed. (See Arts. 52 to 54.) As to the situs of the personal property of nonresident decedents, see Article 50.

Articles 10 and 11 of Regulations 70 (1929 edition) promulgated March 23, 1929, under the Revenue Act of 1926, as amended by the Revenue Act of 1928, are the same as Articles 10 and 11 of Regulations 70 (1926 edition) set out above.

CONGRESSIONAL COMMITTEE REPORTS

Revenue Act of 1916

In the report of the Committee on Ways and Means to the House of Representatives (House Report No. 922, 64th Cong., 1st Session) it was said (p. 5):

> Thirty States have laws imposing inheritance or share taxes both upon direct and collateral heirs. Twelve other States have laws imposing inheritance taxes upon collateral heirs. Your committee deemed it advisable to recommend a Federal estate tax upon the transfer of the net estate rather than upon the shares passing to heirs and distributees or devisees and legatees.

The paragraph set out above was also quoted (p. 3) in the Report of the Committee on Finance to the Senate (Senate Report No. 793, Part 1, 64th Congress, 1st Session).

Revenue Act of 1918

In the report of the Committee on Finance to the Senate (Senate Report No. 617, 65th Congress, 3d Session) it was said (pp. 41–42):

> This form of taxation has now been in operation for about two years and sufficient opportunity has been afforded those engaged in administering the law to observe and report to Congress the effect of the existing law and suggestions for amendments which will bring out more clearly the intention which Congress desired to prevail at the time of the original imposition of an estate tax.
>
> * * * * *
>
> Section 402 of this bill, which takes the place of section 202 of the original act, has been revised so as to contain a provision specifically including in the gross estate dower, curtesy, or any estate created in lieu of dower or curtesy. The distinction between dower and curtesy interest and property passing to

wife or husband by will or intestate succession is technical rather than real, at least in the consideration of the question as to whether they should be subject to estate tax. The proposed amendment is for the purpose of making it clear that such interests are to be included.

It was the intention of the framers of the original act that dower, curtesy, and estates created in lieu of dower or curtesy should be included in the gross estate, and your committee believes that the Treasury Department has correctly ruled in requiring them to be so included. Since a dispute has arisen with reference to this question, your committee deems it advisable to provide specifically that these estates shall be included in the gross estate.

There has also been included in the gross estate the value of property passing under a general power of appointment. This amendment as well as that preceding is for the purpose of clarifying rather than extending the existing statute. A person having a general power of appointment is, with respect to disposition of the property at his death, in a position not unlike that of its owner. The possessor of the power has full authority to dispose of the property at his death, and there seems to be no reason why the privilege which he exercises should not be taxed in the same degree as other property over which he exercises the same authority. The absence of a provision including property transferred by power of appointment makes it possible, by resorting to the creation of such a power, to effect two transfers of an estate with the payment of only one tax.

The gross-estate section has been amended to specifically include (1) insurance receivable by the executor under policies taken out by the decedent upon his own life and (2) insurance in excess of $40,000 receivable by all specific beneficiaries under policies taken out by the decedent upon his own life. (1) Insurance payable to the executor or to the estate is now regarded as falling within section 202 (a) of the existing statute and this construction of the existing statute is now written into the new bill for the sake of clearness. The amendment will serve the further purpose of putting on notice those who acquaint themselves with the statute for the purpose of making more definite plans for the disposition of their property. (2) The provision with respect to specific beneficiaries has been included for the reason that insurance payable to such beneficiaries usually passes under a contract to which the insurance company and the individual beneficiary are the parties in interest and over which the executor exercises no control. Amounts passing in this way are not liable for expenses of administration or debts of the decedent and therefore do not fall within the existing provisions defining the gross estate. It has been brought to the attention of the committee that wealthy persons have and now anticipate resorting to this method of defeating the estate tax. Agents of insurance companies have openly urged persons of wealth to take out additional insurance payable to specific beneficiaries for the reason that such insurance would not be included in the gross estate. A liberal exemption of $40,000 has been included and it seems not unreasonable to require the inclusion of amounts in excess of this sum.

In the report of the Committee on Ways and Means to the House (House Report No. 1, 69th Congress, 1st Session), it was said (p. 15):

> SECTION 302. Under existing law the gross estate is determined by including the interest of the decedent at the time of his death in all classes of property which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate. In the interest of certainty it is recommended that the limiting language above referred to shall be eliminated in the proposed bill, so that the gross estate shall include the entire interest of the decedent at the time of his death in all the property.

APPENDIX B

SUMMARY OF STATE STATUTES ON LIABILITY OF REAL ESTATE FOR ADMINISTRATION EXPENSES *

I

States making statutory provision for the sale of real estate to pay administration expenses

Arizona:

Revised Statutes (1913), Secs. 919, 921.

California:

Code of Civil Procedure (1915), Secs. 1516, 1536, and 1537 as amended by *Statutes and Amendments to the Code,* 1919, p. 1177.

Connecticut:

General Statutes (Revision of 1918), Sec. 5015. See also *Candee* v. *Candee,* 87 Conn. 85; *Phelan* v. *Elbin,* 84 Conn. 208.

Maine:

Revised Statutes (1916), Chap. 76, Secs. 1, 20–21.

Montana:

Revised Code (1907), Secs. 4799–4800. *Plains L. & I. Co.* v. *Lynch,* 38 Mont. 271, 283.

New York:

Parson's Code, Civil Procedure, Annotated (1920), Secs. 2701–2711.

---

* For the sake of uniformity the statutes referred to below are those which were in force in the various states during the year 1920, the year involved in the instant case.

North Dakota:

Compiled Laws (1913), Annotated, Vol. II, Secs. 8771–8780.

Oklahoma:

Revised Laws (1910), Annotated, Vol. 2, Article VIII, Sec. 6360.

South Dakota:

Revised Code (1919), Vol. I, Sec. 3419.

Texas:

Vernon's Sayles Texas Civil Statutes (1914), Vol. 2, Arts. 3489–3507.

Utah:

Compiled Laws (1917), Chap. 10, Sec. 7677.

Vermont:

General Laws (1917), Chap. 151, Secs. 3342–3356.

Virginia:

Code (1919), Secs. 5390, 5395.

Washington:

Remington's Compiled Statutes (1922), Vol. I, Secs. 1494–1504.

West Virginia:

Code (1916), Chap. 85, Sec. 25, Chap. 86, Secs. 3–8.

Wyoming:

Compiled Statutes (1910), Chap. 377, Sec. 5637.

II

States making statutory provision for the sale of real estate to meet the payment of administration expenses after the personal property is exhausted

Arkansas:

Digest of Statutes, Kirby & Castle (1916), Secs. 190–193. No sale will be ordered to

Arkansas—Continued.

meet the payment of administration expenses alone unless the expenses were incurred in administering the estate to pay debts due personally by the decedent. *Flowers* v. *Reece,* 92 Ark. 611; *Collins* v. *Paepcke-Leicht Lumber Company,* 74 Ark. 81; *Mays* v. *Rogers,* 52 Ark. 320.

Colorado:

Colorado, Compiled Laws (1921), Chap. III, Secs. 5296–5324, 5331. *Pinnacle Co.* v. *Popst,* 54 Colo. 451.

Delaware:

Revised Code (1915), Secs. 3417, 3427, 3432.

Florida:

Revised General Statutes (1920), Vol. II, Secs. 3756, 3757.

Idaho:

Compiled Statutes (1919), Vol. II, Chap. 279, Sec. 7602.

Illinois:

Smith's Illinois Revised Statutes, Auth. Ed., 1921, Chap. 3, Secs. 99–111.

Indiana:

Burns's Annotated Statutes (1919), Vol. II, Secs. 2848, 2848 (a).

Iowa:

Compiled Code of Iowa (1919), Secs. 7847, 7872.

Kansas:

Revised Statutes (1923), Chap. 22, Art. 8, Secs. 22–801.

Louisiana:

Saunders' Revised Civil Code, Second Edition, Secs. 1051, 1058, 1164–1166. See also *Suc-*

Louisiana—Continued.

cession of Barry, 130 La. 401; *Rizzotto* v. *Grima,* 164 La. 1, 113 So. 658; *Succession of Ibox,* 144 La. 813, 81 So. 326; *Succession of Trahan,* 118 La. 762, 43 So. 400.

Maryland:

Bagby's Annotated Code (1913), Art. 93, Secs. 290–293.

Massachusetts:

General Laws (1921), Vol. II, Chap. 202, Sec. 1.

Michigan:

Howell's Statutes (1914), Title XXVI, Chap. 301, par. 11231–11244.

Mississippi:

Hemingway's Annotated Code (1917), Secs. 1721, 1735–1737.

Nebraska:

Revised Statutes (1913), Art. X, Secs. 182–184, 190, 193.

Nevada:

Revised Laws (1912), Vol. 2, par. 5985–5997.

North Carolina:

Consolidated Statutes, Annotated (1919), Vol. I, Chap. 1, Sec. 74.

Ohio:

General Code, Page's Compact Edition, Vol. 3, Sec. 10774.

Oregon:

Olson's Laws (1920), Vol. I, Title XVI, Chap. VII, Secs. 1249, 1252.

Pennsylvania:

Statutes (1920), Sec. 8473.

Rhode Island:

General Laws (1923), Sec. 1, par. 5338.

Wisconsin:

Statutes (1919), Vol. II, Chap. 164, Secs. 3822, 3835.

III

States making statutory provision for the sale of real estate to meet the payment of debts if personal estate is insufficient but not for the payment of administration expenses

Alabama:

Civil Code (1907), Vol. 2, Secs. 2619–2620. *Beadle* v. *Steele,* 86 Ala. 413; *Taylor* v. *Crook, Admr.,* 136 Ala. 354.

Georgia:

Park's Annotated Code (1914), Vol. III, Sec. 4026. See also *Beatty* v. *Stapleton,* 110 Ga. 580.

Kentucky:

Carroll's Codes (1919), Title X, Sec. 429.

Minnesota:

General Statutes (1913), Secs. 7336, 7344.

Missouri:

See elsewhere in brief.

New Hampshire:

Public Laws of New Hampshire, Commissioner's Report, 1925, Chap. 300, Sec. 17.

New Jersey:

Compiled Statutes, Vol. 3, Orphans' Courts, Secs. 81–86. But it has been held that the statutory provision for the sale of land to pay debts includes by implication authority to sell to pay administration expenses. *Personette* v. *Johnson,* 40 N. J. Eq. 173, 179.

New Mexico:

Statutes, Annotated, Codification (1915), Chap. LXXXVIII, Secs. 332–347, pp. 1262–1265.

South Carolina:

Code of Laws (1912), Vol. I, Sec. 3637.

Tennessee:

Shannon's Code (1917 Ed.), Secs. 3985, 3991–3998, 4000–4003, 4077–4081.

APPENDIX C

Missouri Statutes and Discussion of Missouri Statutes and Decisions

Revised Statutes of Missouri, 1919

Sec. 141. *Sale of lands to pay debts.*—If any person die and his personal estate shall be insufficient to pay his debts and legacies, his executor or administrator shall present a petition to the proper court, stating the facts; and praying for the sale of the real estate, or so much thereof as will pay the debts and legacies of such deceased person.

Sec. 142. *Petition and exhibits.*—Such petition shall be accompanied by a true account of his administration, a list of debts due to and by the deceased and remaining unpaid, and an inventory of the real estate and of the remaining personal estate, with its appraised value, and all the other assets in his hands, and the whole to be verified by the affidavit of the executor or administrator.

Sec. 145. *When creditor, etc., may make application.*—If such executor or administrator do not make such application, any creditor or other person interested in the estate may make such application, giving twenty days' notice to the executor or administrator. On such application the court shall order publication and notice, as provided in preceding sections.

Sec. 146. *Duty of executor or administrator in such case.*—Every such executor or administrator,

on or before the first day of the term of the court at which he is notified that such application will be made, shall file with the clerk of the court perfect accounts, lists and inventories made out and verified as those required to accompany a petition by himself. If such executor or administrator fail to comply with this section, the court shall compel him to do so by attachment.

SEC. 147. *Lien of judgment or attachment, how stated.*—If such real estate be bound by the lien of a judgment or attachment, the executor, administrator or creditor shall state that fact in his petition, the date and amount of the judgment, and the name of the person in whose favor the same was rendered, and the date of the service of the attachment, the amount claimed thereunder, and the name of the person prosecuting the same.

SEC. 148. *Id. Where there are several such liens.*—If such real estate be bound by the lien of several judgments or attachments, or both, the executor, administrator or creditor shall state that fact in his petition, the dates and amounts of such judgments, and the dates of serving, and the amounts claimed by such attachments, and the names of the persons in whose favor the same were rendered or are prosecuted.

SEC. 149. *The proceeds of sale, how applied—priority of liens.*—The proceeds of the sale of such real estate shall be first applied to the payment of such judgments and attachments, according to their priority of lien, and the residue of such proceeds, if any, shall become assets in the hands of the executor or administrator, to be administered according to law.

SEC. 165. *Court may order sale of its own motion, when—how conducted.*—If, upon the settlement of accounts of any executor or administrator, it appears that the personal estate is not sufficient to pay the debts and legacies, the court may make such order as it may think necessary for sale of the real estate for that purpose, and such order of sale may be made by the court after the filing of any semiannual or annual settlement, and the sale shall be conducted and the same proceedings had in relation thereto as is provided in articles I to XIII, inclusive, of this chapter in relation to the sale of real estate for the payment of debts upon the petition of the executor or administrator, creditor, or other person interested.

SEC. 181. *Demands, how divided.*—All demands against the estate of any deceased person shall be divided into the following classes:

I. Funeral expenses.

II. Expenses of the last sickness, wages of servants and demands for medicine and medical attendance during the last sickness of deceased; also reasonable cost of tombstone if allowed by court.

III. All debts, including taxes due the state or any county or incorporated city or town; and it shall be the duty of the executor or administrator to pay all such taxes without any demand therefor being presented to the court for allowance: *Provided,* that no executor or administrator shall pay any taxes on the real estate of the deceased that are not a charge against the same at the death of the deceased, except where he is in possession of the realty under an order of the court.

IV. Judgment rendered against the deceased in his lifetime, and judgments rendered upon attach-

ments levied upon property of the deceased during his lifetime; but if such judgment shall be liens upon the real estate of the deceased, and the estate shall be insolvent, such judgments as are liens upon the real estate shall be paid as provided in sections 147, 148, 149, 150, 151, 152, 153, 154, 155, without reference to classification, except the classes of demands mentioned in the first and second subdivisions of this section shall have precedence of such judgments.

V. All demands, without regard to quality, which shall be legally exhibited against the estate within six months after the date of the granting of the first letters on the estate.

VI. All demands thus exhibited after the end of six months and within one year after the date of the granting of the first letters on the estate.

SEC. 220. *What disbursements and compensation allowed—administrator and surviving partner administering.*—In all settlements of executors or administrators the court shall settle the same according to law, allow all disbursements and appropriations made by order of the court, and all reasonable charges for funeral expenses, leasing real estate, legal advice and service, and collecting and preserving the estate, also a reasonable cost for a surety company bond, if the court deems it just and proper under all the circumstances connected with the estate to allow cost of such bond, and as full compensation for their services and trouble a commission of five per cent. on personal property and on money arising from the sale of real estate; and that a surviving partner or partners, in administering upon the effects of the copartnership, shall be allowed a commission of three per cent. on the

interest of the deceased partner for like services and trouble.

SEC. 224. *Payment of claims—how ordered upon settlement.*—At every settlement, or at any time thereafter, when the best interests of the estate require it, the court shall ascertain the amount of money of the estate which has come to the hands of such executor or administrator from all sources, and the amount of debts allowed against such estate; and if there be not sufficient to pay the whole of the debts and expenses of administration, the money remaining after paying the expenses of administration shall be apportioned among the creditors according to the provisions of this chapter; and the court shall order that such executor or administrator pay the claims allowed by the court according to such apportionment, reserving apportionments made on claims which remain undecided until decision be had thereon.

DISCUSSION OF MISSOURI STATUTES AND DECISIONS

In general, the real estate of a decedent in Missouri descends to the heirs and does not come into the possession of the administrator for any purpose. *Hall* v. *Bank,* 145 Mo. 418; *St. Louis Nat. Bank* v. *Field,* 156 Mo. 306; *State* v. *Holtcamp,* 245 Mo. 655; *Dildine* v. *De Hart,* 293 Mo. 393. Section 141 of the Revised Statutes of Missouri (p. 47, *supra*) provides for the sale of real estate to meet the payment of debts and legacies only, and provides for such sales only where there is not sufficient personal property to meet the payment of debts and legacies. There is no statutory provision authorizing the sale

of real estate to meet the payment of administration expenses alone, and the Missouri courts have shown no disposition to construe the term "debts" broadly but have commonly held that the probate court can not direct a sale of real estate except for the payment of the debts of the deceased. *Chambers' Adm.* v. *Wright's Heirs,* 40 Mo. 482; *Dildine* v. *De Hart, supra; Langston* v. *Canterbury,* 173 Mo. 122. It has been held that where there are no debts real estate can not be sold merely for the purpose of meeting the payment of administration expenses. *Farrar* v. *Dean,* 24 Mo. 16; *Presbyterian Church* v. *McElhinney,* 61 Mo. 540; *Elstroth* v. *Young,* 94 Mo. App. 351; *Teverbaugh* v. *Hawkins,* 82 Mo. 180.

The question as to whether, when a sale has been made to meet the payment of debts, the proceeds of the sale may be used to meet the payment of administration expenses is one upon which the Missouri decisions are not entirely clear. Section 149 of the Code (*supra,* p. 48) apparently directs that the proceeds of the sale after being first applied to the payment of specific judgments and attachments shall be assets in the hands of the executor or administrator to be administered according to law. Section 181 of the Code (*supra,* pp. 49–50) classifies "demands" against the estate of a decedent and provides for the order of their payment. Administration expenses as such are not specifically mentioned in Section 181 and it has been held that that section has no application to administration expenses which are allowed by the court and are not

"demands" within the meaning of the section. *Crow* v. *Lutz,* 175 Mo. App. 427; *Thompson* v. *Thompson,* 217 S. W. 863.

By Section 220 of the Revised Statutes (*supra,* p. 50) it is provided that in all settlements of an executor or an administrator the court shall allow all disbursements and appropriations made by its order, funeral expenses, expenses of leasing real estate, legal advice and service, collecting and preserving the estate, "and as full compensation for their services and trouble a commission of five per cent. on personal property and on money arising from the sale of real estate." The Missouri courts have followed the plain terms of this section and held that an administrator is entitled to a commission of five per cent on the proceeds of land sold to pay debts. *Crenshaw* v. *Bentley,* 31 Mo. App. 75.

The priority of the payment of administration expenses is recognized in Section 224 (*supra,* p. 51), which directs that at every settlement the court shall ascertain the amount of money in the hands of the executor or administrator from all sources and the amount of debts, and if there be not a sufficient amount to pay the whole of the debts and the expenses of administration, the money remaining after the payment of the expenses of administration shall be apportioned among the creditors.

From these provisions it would seem to follow as a matter of course, that while real property in Missouri is not primarily subject to sale for the payment of administration expenses such property

would become liable in cases where a decedent died owing debts and his estate consisted solely of real property. This was the view of the Board of Tax Appeals in the *Bartlett case, supra,* 16 B. T. A. 811.

In the case of *Elstroth* v. *Young,* 94 Mo. App. 351, the administrator paid to creditors out of the personalty $968 of a total of $1,034 without deducting first the 5% commission or other administration expenses. Later certain proceeds from a sale of realty came into his hands. The court in an earlier proceeding decreed that such proceeds should be distributed to creditors. *Elstroth* v. *Dickmeyer,* 88 Mo. App. 418. The administrator deducted his commission, the general administration expenses, and the expenses attendant upon the sale of realty and distributed the balance. Although the court recognized the rule that real property can not be sold solely to meet the payment of administration expenses, it sustained the distribution. Manifestly, of the two funds it was immaterial from which the deduction is taken, and this is the real effect of the court's decision. It seems clear that in any case where real estate is sold to pay debts, the expenses of the sale and the executor's commission allowed under Section 220 would be paid from the proceeds. To this extent at least the real estate is subject to the payment of administration expenses.

Similarly, in *Howell* v. *Jump,* 140 Mo. 442, it was held that where there are bona fide debts and a sale of real estate was regularly made to pay them, it could not subsequently be set aside because the land

brought only enough to pay the costs of administration. The court said (p. 457):

> The court therefore had jurisdiction to order the sale and the purchaser was not bound to bid an amount which would pay the debts or to see that the money paid was properly applied.

The respondents in their brief in opposition to the petition for certiorari have intimated that this language is equivalent to a statement that the proceeds of the sale had been misapplied. On the other hand, the Court of Claims in the *Steedman case, supra*, relied upon the *Jump case* as authority for the principle that the proceeds from the sale of real estate ordered to meet the payment of debts might properly be applied to the payment of administration expenses. It seems doubtful whether the language used supports either construction.

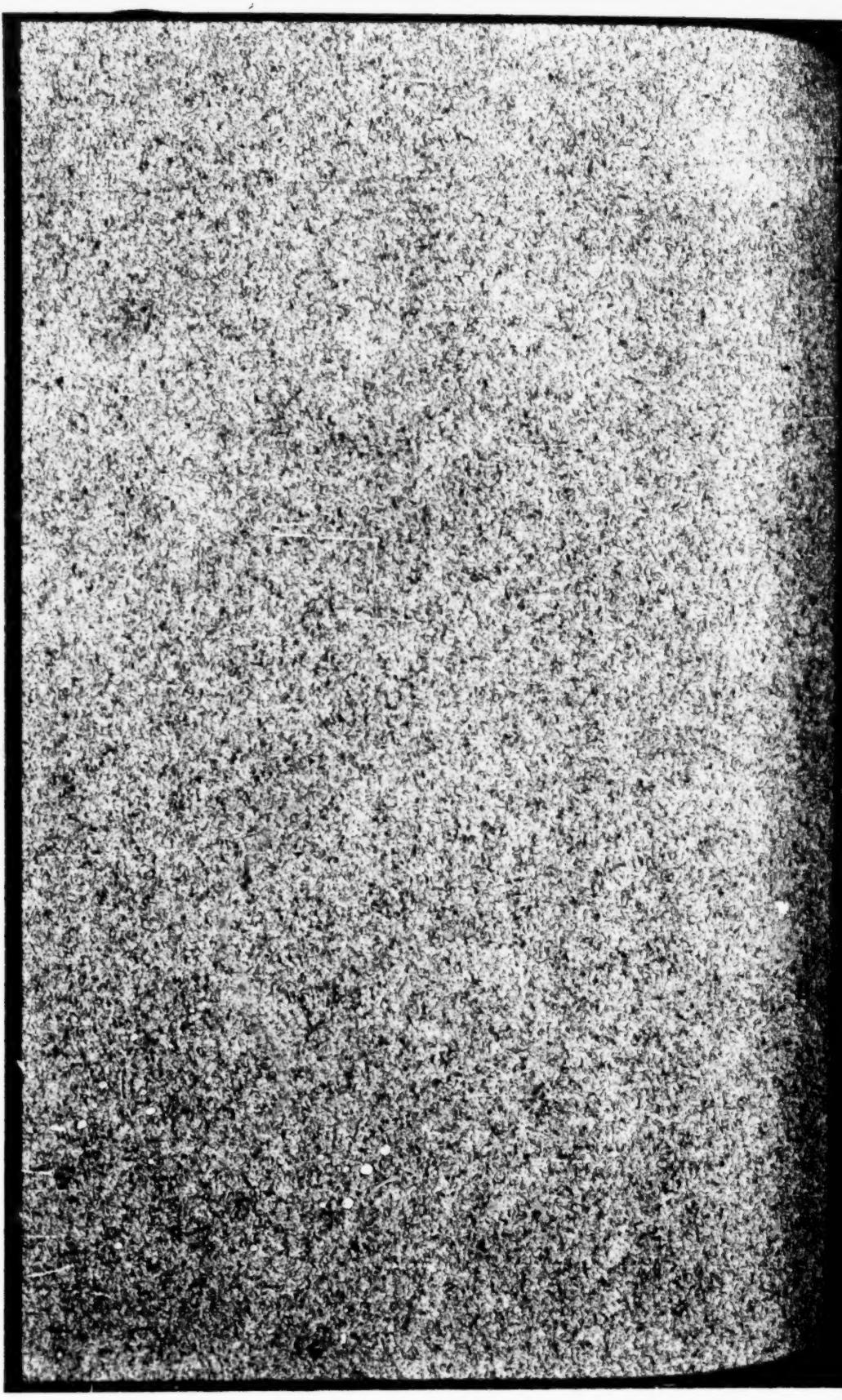
The Circuit Court of Appeals in the instant case reached the conclusion that no portion of the proceeds of a sale of real estate could be applied to the payment of administration expenses by relying upon the cases of *Ritchey* v. *Withers*, 72 Mo. 556; *Elstroth* v. *Young, supra; In re Estate of Lloyd*, 44 Mo. App. 670; *In re Motier's Estate*, 7 Mo. App. 514. It is true that these cases contain certain general expressions which tend to support the Circuit Court of Appeals' conclusion, but none of them involved the question whether administration expenses as well as debts should be paid from the proceeds of a sale of realty ordered to meet the

payment of debts. The *Lloyd case* and the *Motier case* both deal with the widow's statutory allowance out of personalty and hold that such an allowance could not be made out of the proceeds of a sale of realty. This result has since been changed by statute, Missouri Laws, 1921, p. 111. The *Withers case* also involved the widow's allowance and in addition allowances for improvements and repairs to real estate which are not administration expenses. *Langston* v. *Canterbury,* 173 Mo. 122. *The Elstroth case,* for reasons which have previously been given, tends to support the Government's contention.

In none of the cases cited did the Missouri courts attempt to construe the provisions of Section 224 of the Revised Statutes. It thus appears that the Missouri courts have not definitely settled this issue and that this Court is free to make its own interpretation.

It is submitted that the only reasonable construction of Section 224 in conjunction with Sections 141, 149, and 220, is that while real estate in Missouri can be sold only to meet the payment of debts or legacies, when it is sold for that purpose, the administration expenses should be satisfied from the proceeds prior to the satisfaction of the claims of creditors or legatees. In that sense real estate in Missouri fully satisfies even the strictly literal requirements of Section 402 (a).

U. S. GOVERNMENT PRINTING OFFICE: 1930



FILE COPY

RECEIVED
JAN 18 1930
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1929.

No. ~~556~~ 24

NOAH CROOKS, COLLECTOR OF INTERNAL REVENUE,

Petitioner,

vs.

BENJAMIN HARRELSON, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

FRANK S. BRIGHT,
S. L. SWARTS,
MASSEY HOLMES,
Attorneys for Respondents.

The Print Craft Shop, Washington, D. C.

INDEX

	PAGE
Opinion Below	1
Jurisdiction	1
Question Presented	2
Statement	2
Statute and Regulations Involved	2
Argument	3
The conflict with the decision of the Court of Claims does not materially affect the rights of taxpayers nor embarrass the government in its administration of the law in this regard. If this Court declines to grant the writ the Treasury Department will have an authoritative rule for its guidance.	3
The decision of the Circuit Court of Appeals is the correct interpretation of Section 402(a) of the Revenue Act of 1918	5
The decision of the Circuit Court of Appeals is a correct interpretation of the Missouri law	14
Conclusion	15
Appendix	17

CASES CITED

Bartlett v. Commissioner, 16 B. T. A. 811	4
Burk-Waggoner Oil Assn. v. Hopkins, 296 Fed. 492, 269 U. S. 110	7, 11, 13
Howell v. Jump, 140 Mo. 441	14, 15
Keith v. Johnson, 271 U. S. 1	13
Lederer v. Pearce, 266 Fed. 497	12
National Lead Co. v. United States, 252 U. S. 140	7
Nyberg v. United States, 66 Ct. Cls. 153	7, 12, 14
Randolph v. Craig, 267 Fed. 993	10
Schweizer v. Mager, 297 Fed. 334	7

PAGE

Shwab v. Doyle, 258 U. S. 529 6
Steedman v. United States, 63 Ct. Cls. 226 .... 7, 14, 15
United States v. Field, 255 U. S. 257 ..... 5, 9, 12, 14
United States v. Robbins, 269 U. S. 315 ..... 11, 13
Wardell v. Blum, 276 Fed. 226 12

FEDERAL STATUTES CITED

Section 3(b), Act of February 13, 1925 2
Section 402(a), Revenue Act of 1918, 2, 5, 7, 8, 11, 13, 14
Section 302(a), Revenue Act of 1926 ..... 4, 6, 11
Section 402(a), Revenue Act of 1924 8
Section 402(b), Revenue Act of 1918 9
Section 202(a), Revenue Act of 1916 ..... 9, 10
Sections (b), (c), (d), (e), (f), Revenue Act of 1918 11

FEDERAL REGULATIONS CITED

Treasury Regulations 63, Art. 11 (1922 Ed.) 2, 3, 6, 10
Treasury Regulations 70, Art. 10 (1929 Ed.) 3, 6
Treasury Regulations 63, Art. 16 (1922 Ed.) 10

TEXT BOOKS CITED

18 Corpus Juris 803 8

IN THE

Supreme Court of the United States

October Term, 1929.

No. 556

NOAH CROOKS, COLLECTOR OF INTERNAL REVENUE,

Petitioner,

vs.

BENJAMIN HARRELSON, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

OPINIONS BELOW.

The opinion of the District Court of the United States for the Western District of Missouri is reported in 28 Fed. (2d) 510, and the opinion of the United States Circuit Court of Appeals for the Eighth Circuit in 35 Fed. (2d) 416.

JURISDICTION.

The Judgment sought to be reviewed was entered on October 3rd, 1929. The jurisdiction of this Court

is found in Section 3(b) of the Act approved February 13, 1925.

QUESTION PRESENTED.

Whether the value of real property situated in the State of Missouri and owned by the decedent at the time of his death is subject to the Federal Estate Tax under the provisions of Section 402 of the Revenue Act of 1918.

STATEMENT.

The case is correctly stated in the Petition, pages 1 and 2.

STATUTE AND REGULATION INVOLVED.

The Revenue Act of 1918, c. 18, 40 Stat. 1057, 1097:

> Sec. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> (a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate.

Treasury Regulations 63, Article 11 (1922 Edition):

> Character of Interest Included.—It is designed by the foregoing provision of the statute that there shall be included in the gross estate the value of all property of the decedent whether real or personal, tangible or intangible, the beneficial ownership of which was in the decedent in his lifetime, and which, upon his death, formed his estate.
>
> The test which determines whether the value of a given interest is to be so included, pursuant

to the foregoing provision of the statute, is that stated therein which requires that the property, after death, shall be subject to: (1) payment of the charges against the estate, (2) payment of the expenses of administration, and (3) distribution as a part of the estate.

Treasury Regulations 70, Article 10 (1929 Edition):

Character of Interests Included.—It is designed by the foregoing provision of the statute that there shall be included in the gross estate the value of all property of the decedent whether real or personal, tangible or intangible, the beneficial ownership of which was in the decedent at the time of his death.

Where the decedent died prior to 10:25 a. m., Washington, D. C. time, February 26, 1926, the test which determines that the value of a given interest is to be included in the gross estate under the provisions of subdivision (a) of the corresponding sections of the Revenue Acts prior to that of 1926, is whether the property, after death, shall be subject to: (1) Payment of the charges against the estate; (2) payment of the expenses of administration; and (3) distribution as a part of the estate. This test is not applicable if the decedent died subsequent to the effective date of the Revenue Act of 1926.

ARGUMENT.

THE CONFLICT WITH THE DECISION OF THE COURT OF CLAIMS DOES NOT MATERIALLY AFFECT THE RIGHTS OF TAXPAYERS NOR EMBARRASS THE GOVERNMENT IN ITS ADMINISTRATION OF THE LAW IN THIS REGARD. IF THIS COURT DECLINES TO GRANT THE WRIT, THE TREASURY DEPARTMENT WILL HAVE AN AUTHORITATIVE RULE FOR ITS GUIDANCE.

In view of the fact that the question involved affects only real property in the State of Missouri, the conflict with the decision of the Court of Claims occasions

no serious consequences to taxpayers in general and none to particular taxpayers in Missouri. The conflict is unlike one between the decisions of two Circuit Courts of Appeal on a question affecting taxpayers throughout the United States. If this Court declines to grant the writ, the decision of the Circuit Court of Appeals of the Eighth Circuit would be an authoritative rule of guidance for the Treasury Department since all cases arising in the District Courts of Missouri and the Board of Tax Appeals involving this question would necessarily be controlled by this decision. If this Court denies the writ, the decision of the Circuit Court will be the law in the Eighth Circuit, which is the only Circuit in which the question is of any interest or importance. Neither is the case one which can ever arise under the present Revenue Laws since Congress eliminated in the Revenue Act of 1926 the three conditions which limited the operation of the prior Acts.

The Petition (page 3) advances the conflict with the decision of the Board of Tax Appeals in Bartlett v. Commissioner, 16 B. T. A. 811 as a reason for granting the writ. This decision was rendered a few days prior to the argument in the case at bar and copies of the opinion of the Board were furnished the Circuit Court of Appeals at the time of the argument by Counsel for the Respondents in this case. The conflict with the Board of Tax Appeals is not a valid reason for granting the writ since appellate jurisdiction from the decision of the Board in the Bartlett case reposes in the Circuit Court of Appeals of the Eighth Circuit.

The liability of real estate in the State of Missouri to the payment of expenses of administration is a question of local law, and since this Court has repeatedly held that it will follow the interpretation

of the courts of a State upon the laws of that State, it would seem that the decision of the District Court of Missouri and the Circuit Court of Appeals affirming it on such a question would have more weight than that of the Court of Claims.

No other cases are pending in the Court of Claims and naturally none will ever again be brought since under existing laws all such cases could be brought either against the United States or the Collector in the District Courts.

There is no conflict here between decisions of two Circuit Courts which would require the granting of the Petition.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS THE CORRECT INTERPRETATION OF SECTION 402(A) OF THE REVENUE ACT OF 1918.

Petitioner concedes (Petitioner's Brief, page 9) that the Circuit Court of Appeals' construction of Section 402(a) is supported by the language of this Court in the decision in United States v. Field, 255 U. S. 257, 262. This Court in explicit terms there decided that the language in subdivision (a) of the Statute was conjunctive and that in order for the value of property to be included in the gross estate under its terms such property must fulfill all the conditions there expressed. It would seem that this pronouncement should have settled the question for all time.

The Treasury Regulations quoted in the Petition (pages 7 and 8), while the ones in force at the time of this decedent's death, are not in fact the regulations involved. Upon the rendition of the decision in the Field case, supra, and because of that decision, these regulations were amended as quoted on page

2 of this Brief so as to require that the property must be subject to the payment of administration expenses, as well as debts, and to distribution, in order that its value could be included in the gross estate. These were the regulations in force at the time respondents sought to secure a refund of the taxes paid on the value of the real estate, and not those quoted by the Solicitor General.

On February 26, 1926, the Revenue Act of 1926 was approved, in which Congress eliminated the three conditions now under discussion. Section 302(a) of the 1926 Act provides:

> "The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> "(a) To the extent of the interest therein of the decedent at the time of his death."

Thus by eliminating the three conditions expressed in the prior Acts, Congress enlarged the scope of the statute by bringing into the gross estate the value of property which theretofore might not be taxed because it failed to meet the conditions prescribed in the prior Acts.

This is clearly a declaration by Congress of a new intention. (See Shwab vs. Doyle, 258 U. S. 529.)

Regulations 70, Article 10, quoted on page 3 of this Brief, were promulgated in 1929 by the Treasury Department in pursuance of the 1926 and 1928 Acts. Thus it will be seen that the Treasury Department at the time when this case and other cases were pending in the Courts involving the identical question, still interpreted the language of Section 402(a) in support of the construction here contended for by Respondents. The Treasury Department expressly ruled that

where the decedent died prior to February 26, 1926, the property must be subject to payment of administration expenses in order for its value to be included in the gross estate. This construction by the Department has been in force unchanged and unchallenged from 1922 to the present time. While these regulatons of the Treasury Department were in force, Congress re-enacted Section 402(a) without change in the Revenue Acts of 1921 and 1924. The repeated reenactment of a statutory provision without substantial change amounts to an implied legislative recognition and approval of the established executive construction of the statute; Congress being presumed to have legislated with knowledge of the established usage. National Lead Co. v. United States (40 S. Ct. 237, 252 U. S. 140, 3 Am. Fed. Tax Rep. 3042); Burk-Waggoner Oil Assn. v. Hopkins (296 Fed. 492, 4 Am. Fed. Tax Rep. 3851); Schweizer v. Mager (297 Fed. 334, 4 Am. Fed. Tax Rep. 3892).

The correctness of this construction has never been questioned by any Court, so far as Respondents can ascertain, except by the Court of Claims in Steedman v. United States, 63 Ct. Cls. 226. That Court held that Congress did not intend by Section 402(a)—

> "* * * to exclude from taxation all real estate or interest therein which was not subject to the payment of charges against the estate or expenses of administration and subject to distribution, * * * " (See top of page 12 of Petitioner's Brief.)

Since this decision by the Court of Claims, that Court has repudiated its construction as quoted above.

In Nyberg v. United States, 66 C. Cls. 153, decided June 18, 1928, the Court after discussing the nature of the widow's interest in her husband's estate under

the Nebraska law held such interest to be taxable under Section 402(a) of the 1924 Act, saying:

> "Section 402(a), above quoted, mentions three conditions for determining the character of the property, the value of which should be included in the gross estate: (1) That it be subject to the payment of the debts of the decedent; (2) that it be subject to the payment of administration expenses; (3) that it be subject to distribution. The property under discussion was subject to each of these conditions."

A writ of certiorari was denied in this case. Thus it is seen that the Court of Claims in a later decision than the Steedman case has construed the language in Section 402(a) in harmony with the construction placed upon it by the Circuit Court of Appeals in the case at bar.

Petitioner suggests that the qualifying clauses in Section 402(a) were intended by Congress to apply to personal property only. (Petitioner's Brief, page 14). This suggestion is based on the theory that under the ancient common law the word "distribution" was applied to personal property and not to real property, and that Congress was presumed to have known this and used it in its ancient sense. If it were true that Congress had intended to use the word in this sense, then only personal property of an intestate would be taxable and personal property of a testate decedent would escape taxation. Only personal property of an intestate was condidered subject to "distribution" under the rules of the old common law, 18 C. J. 803. That Congress could have intended such a situation is untenable. Moreover the language of the Section under consideration is a single sentence and the qualifying clauses plainly apply to all classes of property enumerated in the first part of the sentence. This same contention was

made by Petitioner in the Court below and was rejected by the Court. (R. 15, 16.)

On page 14 Petitioner states that Congress must be presumed to have known that under the common law real property was not liable either for the payment of debts or administration expenses. If this presumption is tenable, then Congress must also be presumed to have known at the time of the enactment of the 1918 Act that all States of the United States, so far as this Respondent knows, except the State of Missouri, had modified the common law and subjected real estate to the payment of both debts and administration expenses.

On pages 14–16 of Petitioner's Brief it is contended that the report of the Senate Finance Committee on the addition of Section 402(b) of the Revenue Act of 1918, taxing dower, should be accepted as indicating that Congress intended to include dower under the language of Section 202(a) of the 1916 Act. It is argued therefore that the decision of the Court below is erroneous because under it dower would not be taxable under Section 402(a). The extract of the report quoted by Petitioner speaks of the intention of the "framers" of the Act of 1916. If by "framers" the Committee referred to the persons who drafted the Act of 1916, their intention would not be conclusive. It is the intention of the whole Congress that governs. If on the other hand the Committee was referring to the intention of the Congress which passed the Revenue Act of 1916, the Committee's qualifications to speak for the intention of the whole Congress in enacting legislation three years previously would be doubtful to say the least. A similar contention was made by the Government in the case of United States v. Field, supra, and was rejected by

this Court, page 258 of the opinion. Referring to the second part of Petitioner's contention that since under the decision of the Circuit Court of Appeals dower would not be taxable under subdivision (a), such decision does not properly interpret the intention of Congress, this Court's attention is invited to the case of Randolph v. Craig, 267 Fed. 993, decided February 23, 1920. In that case Mr. Justice Sanford, then Judge of the United States District Court for the Middle District of Tennessee, held that dower was not taxable under Section 202(a) of the 1916 Act, saying at page 995:

> "That is as said in Lederer v. Northern Trust Company (C. C. A. 3d. Circ.) 262 Fed. 52, 54, affirming Northern Trust Co. v. Lederer (D. C.) 257 Fed. 812, the tax 'is imposed not upon the interest of the recent owner * * * but upon the transfer of the interest in its devolution.' This is made clear by the express provisions of the act that the tax is imposed 'upon the transfer of the net estate of every decedent' (sec. 201) and that the value of the gross estate is to be determined by 'the extent of the interest therein of the decedent * * * which * * * is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate' (sec. 202)."

This case was not further contested by the Government and the principle there announced was conceded in Treasury Regulations 63 (1922 Edition) Article 16 which provided in part in referring to the dower section of the act:

> "The effect of the provision is to require the inclusion of the full value of the property, without deduction of the value of the interest of the surviving husband or wife. This rule does not apply to the estate of any decedent dying after September 8, 1916, and prior to 6.55 p. m.,

February 24, 1919 (the effective date of Title IV of the Revenue Act of 1918), etc."

Petitioner contends (Petitioner's Brief page 17) that the enactments by Congress of subdivisions (b), (c), (d), (e), and (f) evidence the intent of Congress to include all property transferred at death. These subdivisions (with the exception of (c) relating to transfers during the lifetime of the decedent) were added by Congress at different times subsequent to the original act. It is submitted that they were enacted to reach property which subsequent experience and judicial interpretation demonstrated was not covered by subdivision (a). Congress finally by the Revenue Act of 1926 eliminated the conditions and limitations prescribed in subdivision (a).

It is hard to understand why the petitioner is endeavoring to bring in any interpretations of Section 402(a) by referring to committee reports or other authorities because the rule is definitely fixed that extraneous matters cannot be resorted to in the interpretation of a statute unless there is clearly some ambiguity in the statute, and it would be difficult to find more explicit language than that used by Congress in Section 402(a).

Petitioner concludes with the argument that if it was the intent of Congress to reach all the decedent's real property such intent should not be thwarted by particular rules of property in the several States, and cites United States v. Robbins, 269 U. S. 315, and Burk-Waggoner Oil Association v. Hopkins, 269 U. S. 110, in support of this pronouncement. This argument would be sound if applied to subdivision (a) of the 1926 Act for there it was plainly the intent of Congress to reach all of the decedent's real estate, but the premise is unsound when applied to subdivision (a) of the 1918 Act for there it was plainly the

intent of Congress to reach only such real estate of the decedent as fulfilled the three conditions therein expressed. The only possible criterion for determining whether any given property of the decedent is subject to his debts and to administration expenses and to distribution, is the law of the State governing the devolution of such property. That this is the true criterion was recognized by this Court in United States v. Field, supra. It was recognized by the Court of Claims in Nyberg v. United States, supra, and also by the Circuit Court of Appeals, 3rd Circuit, in Lederer v. Pearce, 266 Fed. 497, wherein the Court said:

> "From the form of the Federal Estate Tax Act, it is evident that Congress intended that the act should operate not in opposition to, but in harmony with the many different State acts, with which, because of its very terms, it would come in contact * * * . Thus it appears that the Federal Estate Tax may reach property in one state when it would fail to reach like property in another, according as the laws of distribution and administration vary in different states. The law of the state being the test of the valid assessment of the tax against given property."

The same criterion was recognized by the Circuit Court of Appeals, 9th Circuit, in Wardell v. Blum, 276 Fed. 226, certiorari denied, 258 U. S. 617, the Court saying:

> "The statute of the United States imposes an inheritance tax upon the transfer of the net estate of every decedent 'to the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration, and is subject to distribution as part of his estate.' How is that interest to be determined? Manifestly, we think,

by the law of the state where the property is situate."

((See Keith vs. Johnson, 271 U. S. 1.)

"The decisions of this Court in United States v. Robbins and Burk-Waggoner Oil Association v. Hopkins, supra, have no application to the question here involved. Both decisions dealt with the income provisions of the law, and there was no occasion to consider limitations such as are expressed in the estate tax provisions of the act. In the Robbins case the principle was announced, as Counsel for Respondents understand it, that it was immaterial whether under the local law the wife had an interest in her husband's income, where Congress had the power and had invoked it to tax the income as that of the husband. The principle announced in the Burk-Waggoner case, as we understand it, was that the local law with respect to the status of unincorporated associations, the relation of the shareholders to each other, to the association, and to outsiders, had no bearing upon the power of Congress to determine how and at what rate the income should be taxed.

In its last analysis the contention of the Petitioner is that section 402(a) should be construed as if the restricting conditions were not there. If the contention of Petitioner is correct then the language "to the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate", is meaningless. This would be an unreasonable conclusion and one not supported by the general rules of construction of legislative enactments.

It is respectfully submitted that the construction placed upon Section 402(a) by the Circuit Court of

Appeals was correct, is supported by the decision of this Court in United States v. Field, supra, by the decision of the Court of Claims in Nyberg v. United States, by the decisions of the Circuit Courts of Appeal of the 3rd and 9th Circuits above quoted, and by the Regulations of the Treasury Department.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS A CORRECT INTERPRETATION OF THE MISSOURI LAW.

Respondents believe that they have demonstrated to the satisfaction of this Court that the construction of the language of Section 402(a) by the Court below was correct. If this be true, then it remains only to determine whether under the administration law of the State of Missouri, real property of a decedent is subject to the payment of the expenses of administration of his estate. This is essentially a question of the law of the State, and this Court has repeatedly stated that it will follow the decisions of the highest courts of a State in the interpretation of its own law.

It will be noted that practically the entire argument of Petitioner is taken up with the construction of the Federal statute and very little attention is given to the question as to whether, under the Missouri law, the real estate is subject to the payment of administration expenses. The Petitioner is contented in this respect with a quotation from the decision of the Court of Claims in the Steedman case (Petitioner's brief, page 16). The only decision cited by that Court in support of its conclusion that the real estate in Missouri was subject to the payment of administration expenses was Howell v. Jump, 140 Mo. 441. This decision, on the contrary, supports Respondent's contention. There the Supreme Court of Missouri held that where the administrator improperly applied the proceeds of the sale of real estate

to the payment of administration expenses, such improper application would not invalidate the sale, since the purchaser was not bound to look to the correct application of the purchase money. It was a recognition of the principle that the proceeds of the sale could not **legally** nor **properly** be applied to administration expenses. This case was considered by the District Court in its decision below (R. 11, 12) and by the Circuit Court of Appeals (R. 19) and both Courts held that it supported Respondents' contentions.

The Circuit Court of Appeals in the instant case has carefully considered the decisions of the State Courts of Missouri and after such consideration has held that real property in Missouri is not subject to the payment of administration expenses. Respondents feel it would greatly serve the convenience of the Court to quote here that portion of the opinion dealing with this subject, but because of its length said quotation is attached hereto as an Appendix.

It is respectfully submitted that the opinion of the Circuit Court of Appeals correctly construed the Missouri law of administration in holding that real estate was not subject to the payment of administration expenses of the estate. It is submitted that the Court of Claims in the Steedman case referred to none of the numerous decisions of the Missouri courts except Howell v. Jump, supra, which case, as found by the Circuit Court, supports Respondents' contention rather than that of Petitioner.

CONCLUSION.

In conclusion it is contended that the decision of the Court below was a correct construction of section

402(a) and a correct interpretation of the Missouri law of administration.

The Federal statute involved has already been construed by this Court, in conformity with the decision of the Court below. The conflict with the decision in the Steedman case, as shown above, has become merely academic, and the Petition should be denied.

Respectfully submitted,

FRANK S. BRIGHT,
S. L. SWARTS,
MASSEY HOLMES,
Attorneys for Respondents.

APPENDIX.

At common law real estate of a decedent was not subject to the payment of his simple contract debts, nor to the payment of legacies, nor to the payment of the expenses of administering the estate. (24 C. J., 459; United States v. Drennen, 25 Fed. Cas., No. 14,992; Titterington v. Hooker, 58 Mo., 593; McQuitty v. Wilhite, 218 Mo., 586, 592.)

Most of the States have by statute changed the common-law rule as relating to debts, and have made the real estate subject to the payment of debts in case the personal property is insufficient for that purpose. Some of the States have by statute made the real estate subject also to the payment of the expenses of administration of the estate. Missouri has by statute modified the common-law rule so far as concerns debts and legacies. Section 141, Revised Statutes of Missouri, 1919, reads as follows:

"Sec. 141. Sale of lands to pay debts.—If any person die and his personal estate shall be insufficient to pay his debts and legacies, his executor or administrator shall present a petition to the proper court, stating the facts, and praying for the sale of the real estate, or so much thereof as will pay the debts and legacies of such deceased person."

In Missouri the common law is in force and effect, except in so far as it has been modified by statute. (R. S. Missouri, 1919, sec. 7048; Lindell v. McNair, 4 Mo., 380; Raume v. Chambers, 22 Mo., 36; Baker v. Crandall, 78 Mo., 584.)

The common-law rule that real estate of a decedent is not subject to the payment of administration expenses is, we think, clearly recognized in Missouri.

In Farrar v. Dean, 24 Mo., 16, 18, the court said:

"The administrator has no power over the real estate, except so far as to hold it for the pay-

ment of the debts of the deceased; and when there are no debts, the land descends to the heirs, or escheats to the State; and it is not in the power of the administrator to hinder this legally; nor can the probate court direct or order a sale of real estate for costs accrued after the administration begins and only because it did begin. Such costs are not debts due by the deceased, nor debts at the time of the death of the intestate."

In Presbyterian Church, etc., v. McElhinney, 61 Mo., 540, 542–3, the Court said:

"Under our statute respecting administration, and the repeated adjudication of this Court thereon, probate courts possess no power to allow any claims against a decedent's estate, or to order the sale of land belonging thereto, except for the payment of the debts of the deceased, i. e., those in existence at the date of his death."

In the case of In re Motier's Estate, 7 Mo. App., 514, 517, the Court said:

"The land belongs to the heirs. It cannot be touched for any of the purposes of administration, except in the specific mode and for the specific objects elsewhere indicated by statute. When real estate is converted into money, whatever surplus remains after a proper application of the objects of the conversion still represents the realty for the benefit of the heirs, and cannot be merged in the personalty for purposes which pertain only to that classification."

In Ritchey v. Withers, 72 Mo., 556, a case in which land was sold by the administrator for the payment of debts, but part of the proceeds was used for the payment of improvements and repairs and for additional allowance to the widow, the Court said (p. 559):

"The county court had no power to order the sale of real estate except for the payment of debts, and when it was sold for that purpose, the proceeds arising from the sale could not be

diverted from it and applied to another and different purpose. The county court could not have ordered a sale of the land for the purpose of paying the administrators for expenses incurred in making improvements thereon nor for the purpose of raising money to appropriate to the widow for her support for twelve months, and it was equally powerless to appropriate to either of said purposes any part of the proceeds derived from a sale of land made to raise money to pay debts."

In State v. Doud, 269 S. W., 923, 924 (Mo. App.), the Court said:

"If the real estate is sold by order of the probate court for the payment of the debts of the decedent, any surplus of the proceeds of the sale remaining after payment of the debts goes to the heir or devisee, and if the heir or devisee has conveyed the real estate the surplus belongs to her grantee. In other words, when real estate is converted into money for the payment of the debts of the decedent, the surplus of the proceeds of the sale remaining, after payment of the debts, retains the character of real estate for the purpose of succession or distribution, and goes to the person in whom the title to the real estate was vested when it was converted."

See also Teverbaugh v. Hawkins, 82 Mo., 180; Garnett v. Carson, 11 Mo. App., 290; In re Estate of Lloyd, 44 Mo. App., 670.

The cases of Elstroth v. Dickmeyer, 88 Mo. App., 418, and Elstroth v. Young, 94 Mo. App., 351, when rightly understood, are in harmony with the foregoing cases. In the Elstroth cases the expenses which were allowed to be paid out of the proceeds of land sold by order of court were the expenses and commissions incurred in or as incidental to the sale of the lands, and were not the ordinary expenses of administration. The distinction is recognized by the Court in the following language in Elstroth v. Young, pp. 355–356:

"The proceeds of the sale of lands made by an order of the probate court in pursuance of the provisions of Chapter 1, Article 8, Revised Statutes, 1899, cannot be used for the purpose of making good deficiencies in the expenses of administration."

In Howell v. Jump, 140 Mo., 441, land was ordered sold to pay debts. The proceeds were applied by the administrator to the payment of the costs of administration and of the sale. The Court recognized the rule in Farrar v. Dean, supra, but held that the sale would not be set aside because of the misapplication of the proceeds.

From the foregoing review of the Missouri authorities we think it is clear that real estate of a decedent in that State cannot be sold for the payment of expenses of administration, nor can the proceeds of land sold to pay debts be lawfully used to pay expenses of administration. We think it follows that such real estate is "not subject" to the payment of expenses of administration within the meaning of section 402(a). We hold, therefore, that the value of the real estate in question should not have been included in the value of the gross estate of the decedent.

FILE COPY

FILED
OCT 29 1930
CHARLES ELMORE CROP
CLERK

Supreme Court of the United States

October Term, 1930.

No. 24.

NOAH CROOKS, COLLECTOR OF INTERNAL REVENUE,
Petitioner,

vs.

BENJAMIN HARRELSON ET AL.,
Respondents.

RESPONDENTS' BRIEF

FRANK S. BRIGHT,
Attorney.

S. L. SWARTS,
MASSEY HOLMES,
L. C. CONNALLY,
H. STANLEY HINRICHS,
BRIGHT, THOMPSON, HINRICHS & WARREN,
Of Counsel.

The Print Craft Shop, Washington, D. C.

INDEX

	PAGE
Statement	1
Statutes Involved	1
Summary of Argument	2
Argument	3
I. Real Estate Owned by the Decedent at the Time of His Death Is Not Taxable Under Sec. 402 (a) of the Revenue Act of 1918, Unles It Fulfills All of the Conditions Expressed Therein.	
II. (a) Paragraph (a) of Section 402 of the Revenue Act of 1918, is Not Ambiguous and There Is No Room for the Construction of Said Provision	5
(b) The Language of Section 402 (a) Is Not Inartificial or Loosely Used as Contended by the Petitioner, but Means Exactly What Is Stated Therein	10
(c) Congress Intended That the Commissioner of Internal Revenue Should Determine by State Laws What Interests Were Taxable Under Said Section 402 (a).	13
(d) The Provision as Enacted Does Not Violate the Constitutional Requirement of Uniformity as Contended by Petitioner	17
(e) The Provision Is Not Discriminatory or Incongruous as Contended by Petitioner	19
(f) The Decision of the Circuit Court of Appeals in This Case Is in Harmony with the Regulations of the Treasury Department	20
(g) The Decision of the Court of Claims in Steedman vs. United States Misconstrued the Statutes	24
III. (a) The Statutes Require, Inter Alia, that Property, to be Taxable Thereunder, Must Be Subject to the Charges Against the Estate and the Expenses of Administration	26
(b) The Word "and" in the Provision Does Not Mean "or" as Contended by Petitioner	32
IV. (a) The Common Law Rule that Real Estate Is Not Subject to the Payment of the Expenses of the Administration of Decedent's Estates Has Not Been Modified by the Stat-	

PAGE

utes of Missouri and Is in Full Force in Said State 33

(b) The Commission Allowed Upon the Sale of Real Estate to Pay Debts of a Decedent Is Not an Expense of Administration 35

(c) The Petitioner in Its Brief Has Misconstrued Certain Decisions of the Missouri Courts 39

Conclusion 43

CASES CITED

Adams v. Pease, 113 Ill. App. 356, l. c. 360 30

Auburn & Syracuse R. Co. v. Hoadley, 195 N. Y. S. 517 27

Bailey v. Homestead Fire Ins. Co., 16 Hun. (N. Y.) l. c. 506 30

Baker v. Crandall, 78 Mo. 584 33

Bartlett v. Commissioner, 16 B. T. A. 811 24

Beaume v. Chambers, 22 Mo. 36 33

Born v. Home Insurance Co., 110 Iowa 379 30

Brine v. Hartford Insurance Co., 96 U. S. 627 15

Brushaber v. Union P. R. Co., 240 U. S. 1 18

Bryan v. Peabody Ins. Co., 8 W. Va. 606 31

Cary v. Denis, 13 Md. 1 34

Clarke v. Clarke, 178 U. S. 186 15

Cook v. Senior, 3 Kans. App. 278 27

Cook v. Woodward, 5 Dem. Sur. 97 37

Crooks v. Harrelson (D. C. Mo.) 28 Fed. (2d) 510; affd. 35 Fed. (2d) 416 ..... 5, 24, 25, 43

De Vaughn v. Hutchinson, 165 U. S. 566 15

Dildine v. De Hart, 293 Mo. 393 34

Drinkwater v. Drinkwater, 4 Mass. 354 ..... 35, 38

Ebert v. Poston, 266 U. S. 548, 553, 554 7

Edye v. Robertson, 112 U. S. 580 18

Eidman v. Martinez, 184 U. S. 578, 583 7

Elstroth v. Dickmeyer, 88 Mo. App. 418 41

Eidman v. Dickmeyer, 88 Mo. App. 418 41

Elstroth v. Young, 94 Mo. App. 351 ..... 34, 41

Empire Fuel Co. v. Hays, 295 Fed. 704 8

Estate of Lloyd, In Re, 44 Mo. App. 670 34

Farrar v. Dean, 24 Mo. 16 ..... 34, 39

PAGE
Fitzgerald v. Glancy, 49 Ill. 465 35
Flint v. Stone Tracy Co., 220 U. S. 107 18
Florida v. Mellon, 273 U. S. 12, l. c. 16, 17 19
Fredelt v. Fair Grounds R. E. Co., 69 S. W. 637 29
Garnett v. Carson, 11 Mo. App. 290 ..... 27, 34, 40
Gould v. Gould, 245 U. S. 151, 153 7
Grant v. Hathaway, 215 Mo. 147 27
Hanibal Trust Co. v. Elzea, 286 S. W. 371 28
Hatch, In Re, 182 N. Y. 320 ..... 35, 37
Hibbard v. Crooks (D. C. Mo.) 25 Fed. (2d) 896 15
Hollman v. Bennett, 44 Miss. 322 35
Howell v. Jump, 140 Mo. 441 ..... 34, 40, 42
Keith v. Johnson, 271 U. S. 1 15
Knowlton v. Moore, 178 U. S. 41 18
LaBelle Iron Works v. United States, 256 U. S. 377 .. 18
Lederer v. Northern Trust Co., 257 Fed. 812, 262 Fed. 52 3
Lederer v. Pearce, 266 Fed. 497 ..... 14, 20
Lindell v. McNair, 4 Mo. 380 33
McQuitty v. Wilhite, 218 Mo. 592 28
Mississippi Mills v. Cook, 56 Miss. l. c. 52 26
Moore v. Ware, 51 Miss 206 35
Motier's Estate, In Re, 7 Mo. App. 514 ..... 27, 34, 40
New York Trust Co. v. Eisner, 256 U. S. 345 ..... 15, 29
Nyberg, Administrator v. United States, 66 Ct.Cls.153 25
Partington v. Attorney General, L. R. 4 H. L. 100, 122 7
Presbyterian Church v. McElhinney, 61 Mo. 540 .... 34, 39
Randolph v. Craig, 267 Fed. 933 ..... 4, 20
Rickenbaugh, In Re, 42 Mo. App. 338 36
Ritchey v. Withers, 72 Mo. 556 ..... 34, 41
Shwab v. Doyle, 258 U. S. 529 ..... 6, 13
State v. Doud, 269 S. W. 923, 924 ..... 34, 38, 40
Stebbins v. Hall, 29 Barb. (N. Y.) 524 27
Steedman v. United States, 63 Ct. Cls. 226 ..... 24, 42
Teverbaugh v. Hawkins, 82 Mo. 180 ..... 34, 40
United States v. Bashaw, 50 Fed. l. c. 754 13
United States v. Field, 255 U. S. 257, 266 ..... 3, 4, 11, 12, 13, 14, 32, 37
United States v. Merriam, 263 U. S. 179 ..... 7, 25
United States v. Weitzel, 246 U. S. 533 8

PAGE

Walker v. Diehl, 79 Ill. 473 35
Wardwell v. Blum, 276 Fed. 226 14
Webb v. Sharp, 13 Wall., l. c. 17 26

TEXT BOOKS CITED

36 Cyc. 1114 and cases cited 11
18 C. J. 1291 and cases cited 11
24 C. J., 133 34
4 Kent. Comm., 419-420 15
Woerner American Law of Administration 3d Ed. p. 1627 35

UNITED STATES STATUTES CITED

Revenue Act of 1916, 39 Stat. c. 463, p. 756, Sec. 202 ..... 4, 12, 20
Sec. 203 (a) (1) 16
Revenue Act of 1918, 40 Stat. c. 18, pp. 1057, 1097-1098, Sec. 402.... 4–6, 8, 10, 12, 15–17, 19, 26, 29, 31, 40
Revenue Act of 1921, 42 Stat. c. 136, pp. 227, 278, Sec. 302 21
Revenue Act of 1924, 43 Stat. c. 234, pp. 253, 304, Sec. 302 22
Revenue Act of 1926, 44 Stat. c. 27, pp. 9, 70, Sec. 302 ..... 4, 5, 6, 12, 22

MISSOURI STATUTES CITED

Regulations 37, Article 4 ..... 20, 21
Revised Statutes 1879, Sec. 3117 a 33
" " 1899, Sec. 6551 33
" " 1909, Sec. 8047 33
" " 1919, Sec. 149 37
" " " Sec 7084 33

TREASURY REGULATIONS CITED

Regulations 37, Article 4 ..... 20, 21
" 37, " 38 16
" 63, " 11 ..... 4, 21
" 68, " 10 ..... 4, 5
" 70, " 10 ..... 5, 22

Supreme Court of the United States

October Term, 1930.

No. 24.

NOAH CROOKS, COLLECTOR OF INTERNAL REVENUE,
Petitioner,

vs.

BENJAMIN HARRELSON ET AL.,
Respondents.

RESPONDENTS' BRIEF

STATEMENT.

The petitioner, in its brief, has correctly stated the facts, and the question presented for determination.

In this brief the respondents answer, in the order in which they appear in petitioner's brief, each of the contentions which is urged by petitioner in support of its specification of error.

THE STATUTE INVOLVED.

Sec. 402, Revenue Act of 1918: That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated.

(a) To the extent of the interest therein of the decedent at the time of his death which after his death is

subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate.

The remaining provisions of Section 402 of the Revenue Act of 1918 are found on pages 29 and 30 of the petitioner's brief.

SUMMARY OF ARGUMENT.

I.

Real estate owned by the decedent at the time of his death is not taxable under Section 402 (a) of the Revenue Act of 1918 unless it fulfills all of the conditions expressed therein.

II.

The petitioner's contentions are incorrect because—

(a) Paragraph (a) of Section 402 of the Revenue Act of 1918 is not ambiguous and there is no room for the construction of said provision.

(b) The language of said paragraph is not inartificial or loosely used, and it means exactly what is stated therein.

(c) Congress intended that the Commissioner of Internal Revenue should determine by state laws what interests were taxable under said paragraph.

(d) The provision as enacted does not violate the constitutional requirement of uniformity as contended by petitioner.

(e) The provision is not discriminatory or incongruous as contended by petitioner.

(f) The decision of the Circuit Court of Appeals in this case is in harmony with the regulations of the Treasury Department.

(g) The decision of the Court of Claims in the case of *Steedman vs. United States* misconstrued the provision and is in error.

III.

(a) The provision requires that property, to be taxable thereunder, must be subject to the charges against the estate and the expenses of its administration.

(b) The word "and" in the provision does not mean "or" as contended by the petitioner.

IV.

(a) The common law rule that real estate is not subject to the payment of the expenses of the administration of decedent's estates has not been modified by the statutes of Missouri and is in full force in said State.

(b) The commission allowed upon the sale of real estate to pay debts of a decedent is not an expense of administration.

(c) The petitioner in its brief has misconstrued certain decisions of the Missouri courts.

CONCLUSION.

Certain real estate in Missouri, being property of the decedent in this case, and not otherwise taxable under the statute, is not taxable under said paragraph (a) of said Section 402, and it was so held by the Circuit Court of Appeals. The decision of said court should be affirmed.

ARGUMENT.

I.

Real Estate Owned by the Decedent at the Time of His Death Is Not Taxable Under Section 402 (a) of the Revenue Act of 1918 Unless It Fulfills All of the Conditions Expressed Therein.

We rely upon:

United States vs. Field, 255 U. S., 257;
Lederer vs. Northern Trust Company, 262 Fed.

52, affirming same case 257 Fed. 812;
Randolph vs. Craig, 267 Fed. 993.

In the *Field* case, this Court dealt with the question whether, under the same provision of the Revenue Act of 1916, property which passed under a testamentary execution of a general power of appointment was subject to the Federal Estate Tax. This Court reached the conclusion that the provisions of the law imposing the tax could not be extended by implication and held that the conditions found in Section 202 (a) of the Revenue Act of 1916 (which conditions are precisely the same as the conditions found in Section 402 (a) of the Revenue Act of 1918) "are expressed conjunctively; and it would be inadmissible, in construing a taxing act to read as if prescribed disjunctively."

After the *Field* case was decided, the Treasury Department adopted Article 11 of Regulations 63, promulgated and approved by the Secretary of the Treasury on July 27, 1922, dealing with the section of the Revenue Act in question and in part providing:

> "The test which determines whether the value of a given interest is to be so included, pursuant to the foregoing provision of the statute, is that stated therein which requires that the property, after death, shall be subject to (1) payment of the charges against the estate, (2) payment of the expenses of administration, and (3) distribution as part of the estate."

Article 10 of Regulations 68 promulgated under the Revenue Act of 1924 was identical with Article 11 of Regulations 63.

Section 302 (a) of the Revenue Act of 1926 differed from Section 402 (a) of the Act of 1918 in that it removed the conditions ruled on by this Court in the *Field* case. The Act, so changed, subjected to the Federal Estate Tax all real and personal property "to the extent

of the interest therein of the decedent at the time of his death", with no limitations or conditions.

Article 10 of Regulations 68 remained in force until the promulgation of Article 10 of Regulations 70 under the Revenue Act of 1926, promulgated March 23, 1929, wherein the change in the law effected by Section 302 (a) of the Revenue Act of 1926 is recognized. Article 10 of Regulations 70 reads in part as follows:

> "Where the decedent died prior to 10:25 A. M., Washington, D. C., time, February 26, 1926, the test which determines that the value of a given interest is to be included in the gross estate under the provisions of Subdivisions (a) of the corresponding sections of the Revenue Acts prior to that of 1926, is whether the property, after death, shall be subject to: (1) Payment of the charges against the estate; (2) payment of the expenses of administration; and (3) distribution as a part of the estate. *This test is not applicable if the decedent died subsequent to the effective date of the Revenue Act of* 1926." (Italics ours.)

Section 402 of the Revenue Act of 1918 constitutes a single sentence. The opening words of the Section are to be read in connection with the several Subsections, and these Subsections (a) to (f), "are what their language states them to be: *extent clauses and not exception clauses.*" (Italics ours) United States Court of Appeals in *Crooks vs. Harrelson,* 35 Fed. (2d) l. c. 417.

II.

(a) Paragraph (a) of Section 402 of the Revenue Act of 1918 Is Not Ambiguous and There Is No Room for the Construction of Said Provision.

Under Point I of the petitioner's brief it is contended that this Court should ignore the plain meaning of the language used in paragraph (a) Section 402 of the Rev-

enue Act of 1918 and construe it "to provide for the inclusion of the value of all real estate in which the decedent had an estate of inheritance in his own right at the time of his death."

The construction contended for would require this Court to eliminate the three conditions set forth in said paragraph (a) as follows:

(1) to the extent of the interest therein of the decedent at the time of his death, which after his death is subject to the payment of the charges against his estate, and

(2) the expenses of its administration, and

(3) is subject to distribution as part of his estate.

Congress in the Revenue Act of 1926 amended the law so as to eliminate the said conditions, the corresponding Section of the Act of 1926 (Section 302 (a) being as follows:

"(a) To the extent of the interest therein of the decedent at the time of his death."

However, if Congress had had the same intention in passing the Revenue Act of 1918 as it had in enacting the Act of 1926, it is manifest that it would have been just as easy to have expressed said intention in 1918 as it was in 1926, and if at any time it had an intention to enact such a provision as is contended for by the petitioner it would have done so by the use of appropriate language.

Shwab vs. Doyle, 258 U. S., 529.

It is fundamental that in the absence of ambiguity in a statute there is no room for construction. The language of Section 402 (a) of the Revenue Act of 1918 is plain and unambiguous and this Court may not read into it an intention not expressed. The statute involved is a

taxing statute and it is also fundamental that if the meaning of a taxing statute is ambiguous, it should be construed in favor of the taxpayer; but in this case the petitioner asks the Court to adopt a construction against the taxpayer not warranted by the language used.

In the case of *United States vs. Merriam,* 263 U. S., 179, 187–8, this Court held that

> "On behalf of the Government is is urged that taxation is a practical matter and concerns itself with the substance of the thing upon which the tax is imposed rather than with legal forms or expressions. But in statutes levying taxes the literal meaning of the words employed is most important for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the Government and in favor of the taxpayer."

citing *Gould vs. Gould,* 245 U. S., 151, 153; *Partington vs. Attorney General,* L. R. 4 H. L. 100, 122; and *Eidman vs. Martinez,* 184 U. S. 578, 583.

In *Ebert vs. Poston,* 266 U. S. 548, 553, 554, this Court said—

> "There is a further contention that the broad purpose of the Act declared in Section 100, demands that it be liberally construed to include the situation presented by this case. Persuasive legislative reasons for distinguishing between the cases explicitly cared for by Sections 302, 205, and the present case suggest themselves. We have no occasion to state them. The judicial function to be exercised in construing a statute is limited to ascertaining the intention of the legislature therein expressed. *A casus omissus does not justify judicial legislation.* * * * Such care and particularity in treatment preclude expansion of the Act in order to include transactions supposed to be within its spirit, but which do not fall within any of its provisions." (Italics ours.)

citing *United States vs. Weitzel,* 246 U. S. 533.

The history of Section 402 of the Revenue Act affords ample illustration of the proposition that the remedy for omissions is not to be found in strained judicial construction but in the enactment of new subsections to cover such omissions. In *Empire Fuel Company vs. Hays,* 295 Fed. 704, the Court stated:

> "It is the duty of courts to interpret and enforce the statutes, not to inquire into their underlying policy, their reasons, or their effect when enforced. If a statute is unsound in its operation, the remedy is with the Legislature, and not with the judiciary. Courts have no power to suspend the operation of a statute, even though that operation might furnish an advantage to one citizen as against another, provided the statute is constitutional."

We submit that Section 402 of the Revenue Act of 1918 is drawn with such particularity as to leave no room for conjecture. It describes in detail the several items of property which are taxable thereunder. Rarely does it provide for the taxing of all property of any of the several items. Thus, in paragraph (a) the entire value of the property is not taxed but only the interest therein of the decedent at the time of his death and that interest is not taxable unless it is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate. Paragraph (b) covers dower interests. In paragraph (c) every interest of which the decedent has made a transfer is not taxed because there are excepted those transfers where a bona fide sale for a fair consideration or money's worth was made, and no interest transferred is taxable unless the transfer was made in contemplation or intended to take effect in possession or enjoyment at or after death. In paragraph (d) every joint estate is

not taxed because there is excepted such part thereof as did not originally belong to decedent. Under paragraph (e) every property passing under a general power of appointment is not taxed because there are excepted those cases where the transfer was made by deed not executed in contemplation of or intended to take effect in possession or enjoyment at or after death and also those cases of bona fide sale for a fair consideration in money or money's worth. Under paragraph (f) all insurance payments under policies upon the life of the decedent are not taxable because no tax is levied upon policies taken out by other persons upon the life of the decedent, and payments made under policies taken out by the decedent on his life, but payable to other persons than the executors, are not taxable unless they exceed $40,000.00 and only to the amount that they exceed said sum.

It is true as stated on page 10 of the petitioner's brief that at common law real property of the decedent was not liable for the payment of either simple contract debts or the expenses of administration. In those states in which real estate is now subject to such debts and such expenses, it is by virtue of a state statute modifying the Common Law. As an appendix to petitioner's brief is a summary of the statutes of the several states changing the common law in that respect. Said compilation shows that in ten states the common law has been changed to the extent of rendering the real estate liable for the payment of debts of the decedent, but not for the payment of expenses of administration. Said summary also shows that in twenty-two states the common law has been changed so as to provide for the sale of real estate to meet the payment of administration expenses only after the personal property has been exhausted and that there are only sixteen states where the statutes provide for

the sale of real estate to pay administration expenses unconditionally.

Congress is presumed to know the law and to know that there was a considerable difference in the laws of the several states with reference to the liability of the real estate of a decedent to pay the expenses of administration. In view of the lack of uniformity of the laws of the several states, the provision in Section 402 (a) levying a tax upon only such real estate of decedents as is subject to the payment of charges against the estate and the expenses of its administration is all the more significant.

(b) The Language of Section 402 (a) Is Not "Inartificial or Loosely Used" as Contended by the Petitioner, but Means Exactly What Is Stated Therein.

The only reason urged by the petitioner in support of the contention that said paragraph is not to be construed according to the plain meaning of the language used is that the said language of said paragraph (a) "is inartificial and is loosely used." (Page 10.) There is only one word in said paragraph (a) which is pointed out in petitioner's brief as being inaccurate or ambiguous and that is the word "distribution" with which this case is not concerned. The point is made that the only property which is subject to distribution as a part of an estate in the "accurate" meaning of that word is personal property, whereas the paragraph is intended to include real as well as personal property. (Page 11.) (Attention is invited to the discussion of this point in the opinion of the court below (R. 11-12) which is directly contrary to the statement made in the footnote on page 10 of the petitioner's brief.)

We deny that the word "distribution" as used in said Section 402 (a) is inaccurate or ambiguous. While the word "distribution" has a *technical* meaning in accordance

with the petitioner's contention, it is fundamental that the words of the statute are to be construed in their natural, plain and ordinary signification as was held by the court below in the instant case.

36 Cyc. 1114 and cases cited.

The general meaning of the word "distribution" is "the act of distributing or dispensing; the act of dividing or portioning among several or many; the act of dividing or making apportionment; apportionment."

18 C. J. 1291 and cases cited.

Except for the alleged misuse of the word "distribution", it is not apparent from the petitioner's brief why this court should give a different meaning to the language of said paragraph (a) than that which the plain language imports, except the fact that the construction urged by the petitioner would enable the Internal Revenue Bureau to tax some property which is not within the purview of the language of the provision as enacted.

On page 9 of the petitioner's brief it is admitted that the five paragraphs immediately following said paragraph (a) "are most comprehensive and evidence sedulous care to include in the gross estate all property which could be regarded as having undergone a taxable transfer by death." There is no reason for believing that any less care was exercised in one paragraph than in any other, and that it was within the power of Congress to define what was a "taxable transfer," and that only those are taxable transfers which are specifically enumerated as such in the statute. Congress used the identical language in the Revenue Acts of 1916, 1918, 1921, and 1924.

Moreover, the language of said paragraph (a) has already been construed not only by the court below, but by this court in the case of *United States vs. Field*, 255

U. S. 264, to mean precisely what is stated therein. That case arose under Section 202 (a) of the Revenue Act of 1916, but the language of that Section is identical with said paragraph (a) of Section 402 of the Revenue Act of 1918. In the *Field* case this Court held that the said language in the Revenue Act of 1916 meant exactly what it states and that, unless an interest of the decedent fulfilled all of the conditions enumerated therein, it was not taxable under said provision. The subject matter of the controversy in the *Field* case was certain property passing under a general power of appointment. It was held that that property was not taxable because it did not fulfill two of the conditions, namely, it was not the property of the decedent at the time of her death nor subject to distribution as a part of her estate. In the opinion of the Court in the *Field* case it is stated that:

> "It would have been easy for Congress to express a purpose to tax property passing under a general power of appointment exercised by decedent had such a purpose existed; and none was expressed in the act under consideration. In that of February 24, 1919, which took its place the section providing how the value of the gross estate of the decedent shall be determined contains a clause precisely to the point (Section 402 (e), 40 Stat. 1097 * * * Its insertion indicates that Congress at least was doubtful whether the previous act included property passing by appointment."

We submit that the petitioner would have this Court construe and apply Section 402 (a) of the Act of 1918 as if it read identical with Section 302 (a) of the Act of 1926; that is, by striking out the three conjunctive conditions. It would have been easy for Congress to have omitted said three conditions from the Act of 1918 if such had been the will of Congress.

On page 19 of the petitioner's brief it is stated that the *Field* case involved no question of state law or the meaning of the phrase "subject to the payment of the charges against his estate and the expenses of its administration," but we say that the Court in that case specifically refers to the law of Illinois and decided the case with reference to the conditions in said paragraph (a) as applied to the law of Illinois. After discussing the general rule of the liability of appointed property to the payment of the decedent's debts at common law the Court stated, "It is tacitly admitted that the rule obtains in Illinois, and we shall so assume."

In the case of *United States vs. Bashaw,* 50 Fed. 1. c. 754, cited by this Court in the *Field* case, the Court held—

> "It is a fundamental rule of construction that, if possible, force must be given to all the words used therein, and also that, when a previous statute is amended by an alteration of the terms used therein it is to be presumed that it was the intent to alter the meaning of the previous Act in that particular. * * * The natural presumption is that the phraseology of the statute was changed in order to change its meaning. The very fact that the prior Act is amended demonstrates the intent to change the pre-existing law, and the presumption must be that it was intended to change the statute in all the particulars touching which we find a material change in the language of the Act."
>
> See also *Shwab vs Doyle,* 258 U. S., 529.

(c) Congress Intended That the Commissioner of Internal Revenue Should Determine by State Laws, What Interests Were Taxable Under Section 402 (a).

On page 12 of the petitioner's brief the point is made that Congress did not intend that the Commissioner of Internal Revenue, in computing the value of the gross estate, should be required to consult the statutes and the

decisions of the state in which the real estate is located in order to determine whether or not the value of the real estate should be included in computing the estate tax. No decision of any Court is cited in support of this contention and it is contrary to every decision which we have been able to find. We see no reason why the Commissioner should not be required to consult the said statutes and decisions. On the contrary, it is necessary for the Commissioner to do so in order to apply the law. The question whether a particular interest in land is taxable under said paragraph (a) of Section 402, depends entirely upon the law of the state where the land is situated.

This Court, in *United States vs. Field, supra,* considered the law of the state of Illinois (the state where the property in question was situated) in determining that such property failed to meet the conditions in the Federal Act and was therefore not taxable. Also, the Circuit Court of Appeals, 3rd Circuit, in *Lederer vs. Pearce,* 266 Fed. 497, has said.

> "From the form of the Federal Estate Tax Act, it is evident that Congress intended that the Act should operate not in opposition to, but in harmony with the many different State Acts, with which, because of its very terms, it would come into contact * * * Thus it appears that the Federal Estate Tax may reach property in one state when it would fail to reach like property in another, according as the laws of distribution and administration vary in different states. The law of the state being the test of the valid assessment of the tax against given property. * * *."

And again the Circuit Court of Appeals, 9th Circuit, in *Wardell vs. Blum,* 276 Fed., 226, stated with reference to Section 402 (a) that:

"The statute of the United States imposes an inheritance tax upon the transfer of the net estate of every decedent 'to the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration, and is subject to distribution as part of his estate.' How is that interest to be determined? Manifestly, we think, by the law of the state where the property is situate."

Brine vs. Hartford Insurance Company, 96 U. S. 627;
Clarke vs. Clarke, 178 U. S. 186;
De Vaughn vs. Hutchinson, 165 U. S. 566;
Hibbard vs. Crooks, (D. C. Mo.) 25 Fed. (2d) 896.

And please compare *New York Trust Company vs. Eisner,* 256 U. S. 345 with *Keith vs. Johnson,* 271 U. S. 1.

By common law, real estate descended by intestacy or devised by will was not liable to simple contract debts of the ancestor or testator; nor was the heir bound even by a specialty, unless he was specially named. 4 *Kent. Comm.* 419-420, citing 3 *Black, Com.* 430, *Co.* Litt. 209, a, So that it is necessary for the Commissioner to refer to the state statutes to determine whether or not the interests of a decedent in lands fulfills the condition of Section 402 (a) of being subject to the payment of the charges against his estate, as well as the condition of being subject to the payment of the expenses of its administration. Moreover, by the common law title by escheat and by forfeiture obtained (e. g., in the cases of foreigners, for lack of heirs, for the commission of certain crimes, for the commission of waste, etc.). And the Commissioner may have to refer to state statutes and decisions in many cases to determine whether or not the interest of a decedent in real estate fulfills the condition of Section 402

(a) of being subject to distribution as a part of his estate, because it is only by statutes of the several states that the rigors of the common law have been modified or abolished.

Under each and every Revenue Act from 1916 to 1928, both inclusive, the amount of Federal Estate Taxes payable by any estate depends to some extent upon the laws of the state in which the estate is being administered. For example: Section 203 (a) (1) of the Act of 1916, provided that for the purpose of the Federal Estate Tax, there should be deducted from the value of the gross estate—"Such amounts for * * * support during the settlement of the estate of those dependent upon the decedent, and *such other charges* against the estate, *as are allowed by the laws of the jurisdiction,* whether within or without the United States, under which the estate is being administered." (Italics ours.)

Article 38 of Regulations 37 provides in part that "In order to be deductible, the item must be of the character described in the statute; and it must also be one the payment of which out of the estate is *allowed by the law of the jurisdiction administering it.* Where the item is not one of those described, it is not deductible merely because payment is allowed by the *local law.* On the other hand, no item is deductible unless its payment is so allowed. * * * Where the amount which may be expended for the particular purpose is limited by the *local law,* no deduction in excess of such limitation is permissible. Where the *local courts* have approved the expenditure it will ordinarily be allowed for deduction." (Italics ours.)

From the foregoing and from an examination of the subsequent Revenue Acts and the Regulations promulgated thereunder, it is obvious that the Federal Estate Tax has

at all times been, and is now, so interwoven with the laws of administration of the several states as to be practically inseparable therefrom and that Congress clearly intended that such a situation should exist. It thus appears that Congress not only did intend that the taxability of property of a decedent should, in certain respects, depend upon the laws of the several states, but it becomes obvious that, in the type of legislation under consideration, Congress had to consider and take into account the statutes and decisions of the several states.

Certainly when Congress, in 1916, and in the subsequent Revenue Acts of 1918, 1921, and 1924, provided that there shall be subject to the Federal Estate Tax property which is subject to the conditions indicated, it never had in mind any Federal law because there was no Federal law by which to measure such conditions. Only by the laws of the several states could it be determined whether the property of the decedent meets the three conditions.

Moreover, it should be remembered that real estate *as such* is not taxed by Section 402 (a), but only "to the extent of the interest therein of the decedent" which "is subject to" the three conditions set forth in Section 402(a).

(d) The Provision as Enacted Does Not Violate the Constitutional Requirement of Uniformity as Contended by Appellant.

The petitioner, on page 13 of its brief, questions the constitutionality of an Act which results in the imposition of taxes upon real estate in some states and fails to tax the same class of property located in other states. If that is material, we would say that it is purely academic so far as the consideration of Section 402 (a) of the Revenue Act of 1918 is concerned, because said provision taxes the same class of property wherever it may be in the

United States, and reaches all real estate wheresoever situated and to whomsoever belonging which fulfills the conditions prescribed in said paragraph (a).

The only rule of uniformity prescribed by the Federal Constitution with respect to duties, imposts, and excises laid by Congress is the territorial uniformity which the United States Constitution, Article 1, Section 8, requires.

LaBelle Iron Works vs. United States, 256 U. S. 377;

Brushaber vs. Union P. R. Co., 240 U. S. 1

A tax is uniform within the meaning of the constitutional provision on that subject, when it operates with the same effect in all places where the subject is found; and it is not wanting in such uniformity because the thing taxed is not equally distributed in all parts of the United States.

Edye vs. Robertson, 112 U. S. 580.

The uniformity required is not an intrinsic uniformity relating to the inherent character of the tax as respects its operation on individuals; but is merely a geographical uniformity requiring the same plan and the same method to be operative throughout the United States.

Knowlton vs. Moore, 178 U. S. 41.

In the case of *Billings vs. United States,* 232 U. S. 261, it was held that a tax upon the gross tonnage of foreign-built pleasure yachts owned by citizens of the United States did not violate the uniformity clause because a like tax was not imposed upon the use of a domestic yacht under similar circumstances.

In the case of *Flint vs. Stone Tracy Co.,* 220 U. S. 107, it was held that inequality of application owing to different local conditions did not invalidate the excise imposed by the Act of August 5, 1909, upon the doing or the carrying on of business in a corporate or quasi corpo-

rate capacity; and that the exemption of a similar business when carried on by a partnership or private individual did not invalidate the Act inasmuch as the only limitation upon the power of Congress is a geographical uniformity.

It is submitted that the contention of appellant is completely answered by the decision of this Court in *Florida vs. Mellon,* 273 U. S. 12. In that case, 1. c. 16, we find—

> "It is further alleged * * * that the several states except Florida, Alabama and Nevada, levy inheritance taxes, but by reason of the provisions of its constitution, Florida cannot place its citizens on an equality with those of the other states in respect to the tax in question, and therefore the tax is not uniform throughout the United States, as required by Sec. 8 of Art. I of the federal constitution."

The Court finds, l. c. 17, that—

> "The contention that the federal tax is not uniform because other states impose inheritance taxes while Florida does not, is without merit. Congress cannot accommodate its legislation to the *conflicting or dissimilar laws of the several states* nor control the diverse conditions to be found in the various states *which necessarily work unlike results from the enforcement of the same tax.* (Italics ours..) All that the Constitution (Art. I, Sec. 8 cl. I) requires is that the law shall be uniform in the sense that by its provisions the rule of liability shall be alike in all parts of the United States."

(e) The Provision Is Not Discriminatory or Incongruous as Contended by Petitioner.

The provision requiring that property shall be subject to the payment of administration expenses in paragraph (a) of Section 402 of the Revenue Act of 1918, literally construed in accordance with its plain and precise language is neither discriminatory nor manifestly incongru-

ous as stated on page 13 of the petitioner's brief. The Supreme Court of the United States in the case of *United States v. Field* had no difficulty in construing this statute and did not find it incongruous or discriminatory. The Internal Revenue Bureau in its regulations did not find it discriminatory or incongruous and the United States Circuit Court for the 3rd circuit in *Lederer vs. Pearce,* 266 Fed. 497, and the United States District Court in *Randolph vs. Craig,* 267 Fed. 933, also found that the language of the statute meant exactly what the plain purport of the words implied.

It is interesting to note that the decision in the cases above cited are exactly in line with the precise language of the regulations always in force in respect to this provision of the statute.

Elsewhere in the brief it is pointed out and here we reiterate that the contention of the Government would result not in a construction of the language of the provision but in the substitution of an amendment to the 1916, 1918, 1921, and 1924 acts, whereas Congress did not amend this provision until the 1926 Act.

(f) The Decision of the Circuit Court of Appeals in This Case Is in Harmony With the Regulations of the Treasury Department.

On pages 16 and 17 of the petitioner's brief, it is urged that the construction contended for by the petitioner is in accordance with contemporaneous and continued construction of the provision by the Department charged with its administration and, therefore, is entitled to great weight. We take issue with the petitioner as to the statement of fact.

The identical language of this provision was enacted in Section 302 of the Revenue Act of 1916. Article 4 of Regulations 37, promulgated October 10, 1916, construing

said Section, printed on page 31 of the petitioner's brief, is plain and unambiguous and utterly fails to sustain the contention of the petitioner. The meaning given paragraph (a) follows the language of said provision and is precisely what we contend for, as follows:

> "(1) The entire estate of every kind, real, personal, mixed, tangible and intangible property, coming into the hands of executors or administrators, or such as would legally come into their charge if executors or administrators were appointed, *and which property would be subject to charges against the estate, expenses of administration, and distribution to the heirs or legatees.*" (Italics ours.)

The petitioner on page 16 of the brief states that these Regulations "were not very definite." They seem to us to be very definite, direct and unambiguous.

Following the enactment of the Revenue Act of 1918, said Regulations 37 were revised in 1919, and were again revised in January, 1921. In each of said revisions, the various paragraphs of Section 402 were printed, but without any comment thereon other than as set forth on pages 32-35 of the petitioner's brief. We submit that the said Regulations do not assume to construe the language of any of the paragraphs of Section 402, in any particular. However, the identical language of paragraph (a) of Section 402 was re-enacted as Section 402 (a) of the Revenue Act of 1921, and Article 11 of Regulations 63, relating to estate taxes under the Revenue Act of 1921, promulgated by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury on July 27, 1922, printed on page 34 of the petitioner's brief, provides as follows:

> Article 11. Character of Interests Included.—It is designed by the foregoing provision of the statute that there shall be included in the gross estate the value of all property of the decedent whether real or

personal, tangible or intangible, the beneficial ownership of which was in the decedent in his lifetime, and which, upon his death, formed his estate * * *.

"The test which determines whether the value of a given interest is to be so included, pursuant to the foregoing provision of the statute, is that stated therein which requires that the property, after death, shall be subject to : (1) payment of the charges against the estate, (2) payment of the expenses of administration, and (3) distribution as a part of the estate."

The above language of the Regulation of the Treasury Department is, we submit, clear and unmistakable in its meaning, follows the language of the statute, and is in harmony with the meaning for which we contend, and contrary to the construction now being urged by the petitioner.

The identical language of said paragraph (a) was reenacted as Section 302 (a) of the Revenue Act of 1924, and Article 10 of Regulations 68 promulgated March 26, 1925, is (as indicated on page 35 of the petitioner's brief) identical with the language quoted above from Article 11 of Regulations 63.

As stated on page 6 of this brief, said paragraph (a) was amended in the Revenue Act of 1926 so as to include in the gross estate of the decedent the value of all property "To the extent of the interest therein of the decedent at the time of his death" and the three conditions imposed by paragraph (a) of the former Revenue Acts were omitted. Thereafter, the Treasury Department promulgated Regulations 70 on August 24, 1926, and Article 10 thereof, quoted on page 35-36 of the petitioner's brief, provided as follows—

"ART. 10. CHARACTER OF INTERESTS INCLUDED.—It is designed by the foregoing provision of the statute that there shall be included in the gross estate

the value of all property of the decedent, whether real or personal, tangible or intangible, the beneficial ownership of which was in the decedent at the time of his death.

"Where the decedent died prior to 10:25 A. M., Washington, D. C., time, February 26, 1926, the *test which determines* that the value of a given interest is to be included in the gross estate under the provisions of subdivisions (a) of the corresponding sections of the Revenue Acts prior to that of 1926, is whether the property, after death, shall be subject to: (1) Payment of the charges against the estate; (2) payment of the expenses of administration; and (3) distribution as a part of the estate. *This test is not applicable if the decedent died subsequent to the effective date of the Revenue Act of* 1926." (Italics ours.)

It is thus apparent that the Treasury Department recognized that the Act of 1926 effected a complete change in the law, and even after the date of the passage of the 1926 Act the Treasury Department continued to recognize that under the prior acts no property not meeting the three conditions of paragraph (a) was taxable.

Statements on pages 16 and 18 of the petitioner's brief to the effect that the practice of the Treasury Department was contrary to the wording of its own regulations is an erroneous statement of fact. But there is no evidence in the record from which this Court could determine what is the fact.

We submit that the Treasury Department has not, in any of its Regulations, found any ambiguity in the language of paragraph (a) of said Section 402, has not construed said language as meaning other than the plain import of the words used therein and has not construed said provision as urged by the petitioner, but has always

construed the statute precisely as respondents are now contending the same should be construed.

(g) The Decision of the Court of Claims in Steedman vs. United States Misconstrued the Statute.

Petitioner relies upon *Steedman vs. United States,* 63 Ct. Cls. 226 and *Bartlett vs. Commissioner,* 16 B T. A. 811. In the *Bartlett* case, there was a dissenting opinion which we contend sets out the law of the case. The decision of the Court of Claims in the *Steedman* case was considered both by the District Court and the Circuit Court of Appeals in the instant case. The District Court said:

> "Defendant cites the case of *Steedman vs. United States,* a decision by the Court of Claims involving the same question as that involved here. I have read the opinion in that case carefully. I think it is not well reasoned and that its conclusion is erroneous." (R. p. 9.)

The Circuit Court of Appeals said:

> "The case of *Steedman vs. United States,* 63 Ct. Cls. 226, involved a question identical with that in the case at bar, and a conclusion was reached by that court opposite to the one which we have above indicated. We have the utmost respect and deference for the opinions of that court. We have therefore given careful thought and consideration to the opinion in the *Steedman* case and we regret that we are unable to acquiesce in the conclusion therein reached." (R. p. 15.)

An examination of the opinion of the Court of Claims in the *Steedman* case will show that the Court misconstrued Section 402 of the Revenue Act of 1918, and erroneously held that it was not necessary to construe the precise language of any part of the statute, but that any

particular provision should be construed in accordance with the general purpose of the Act. On the other hand, the Circuit Court of Appeals in the case at bar said—

> "The entire section constitutes a single sentence. * * * It is only by reading the opening words in connection with one or more of the clauses (a) to (f) that any definite amounts of any kind of property can be arrived at. Clauses (a) to (f) are what their language states them to be—extent clauses and not exception clauses." (R. p. 11.)

Where statutes are ambiguous, Courts sometimes do extend the meaning of a particular provision of a statute, especially in remedial legislation. But this particular statute is not ambiguous and there is no room for construction. And that even if there were, the rule is entirely different in the case of a taxing statute. This Court has held in the case of *United States vs. Merriam,* 263 U. S. 187, that:

> "in statutes levying taxes, the literal meaning of the words employed is most important for such statutes are not to be extended by implication beyond the clear import of the language used."

Moreover, in the case of *Nyberg, Administrator, vs. United States,* 66 Ct. Cls. 153, that Court, in construing said Section 402 (a), apparently receded from the reasons upon which it based its conclusion in the *Steedman* case. The following language in the latter decision is significant:

> "402 (a) above quoted, mentions three conditions for determining the character of the property, the value of which should be included in the gross estate, (1) that it be subject to the payment of the debts of the decedent; (2) that it be subject to the payment of administration expenses; (3) that it be subject to distribution. The property under discussion was subject to each of these conditions."

III.

(a) The Statute Requires, Inter Alia, That Property, to Be Taxable Thereunder, Must Be Subject to the Charges Against the Estate and the Expenses of its Administration.

Under Point II of the petitioner's brief it is urged that Section 402 (a) should be construed to mean that if, under the law of a state, the real property of a decedent could, as a practical matter, be applied either directly or indirectly to the payment of expenses of administration, under any circumstances, then the real estate of decedents in such state fulfills the condition of Section 402 (a). The question is academic in the case at bar, because as we show on pages 33 to 43 of this brief, the real estate of decedents in Missouri cannot be applied either directly or indirectly, under any circumstances to the payment of the administration expenses. Congress could have enacted such a provision, but it did not do so. The statute provides for a uniform tax throughout all the states upon certain interests in property of decedents, and it enacts that the interest of any decedent in any property is taxable provided it fulfills certain conditions, among them being that said property is subject to the charges against the estate and the expenses of administration. The ordinary meaning of the word "subject" is not the same as "could as a practical matter be applied either directly or indirectly under any circumstances," and there are no decisions of courts so construing the word "subject". The petitioner cites no authorities in support of its contention.

The Supreme Court of the United States in *Webb vs. Sharp,* 13 Wall., l. c. 17, in construing the words in a statute "subject to execution for debt" held them to mean "subject to sale by execution." In *Mississippi Mills vs. Cook,* 56 Miss. l. c. 52, the phrase "subject to" is held

to mean "liable." Likewise see *Auburn and Syracuse R. Co. vs. Hoadley,* 195 N. Y. S. 517; *Cook vs. Senior,* 3 Kans. App. 278; *Stebbins vs. Hall,* 29 Barb. (N. Y.) 524. The phrase "subject to the payment of an expense" has a definite meaning as demonstrated by the cases, i. e., "charged with the payment," "liable for the payment," "subject to sale for the payment."

The Missouri Appellate Courts in several cases deal with the expression "subject to" or "subject" in discussing the matter of subjecting the land to the burdens of expenses of administration or other burdens. Thus in *Grant vs. Hathaway,* 215 Mo. 147, the Supreme Court of Missouri in referring to the statutory provision vesting the land in the heirs states that it so vests the land "subject to statutory rights."

Again in In re *Motier's Estate,* 7 Mo. App. 514, the Court held:

> "The land * * * *cannot be touched for any of the purposes of the administration except in the specific mode and for the specific objects* elsewhere indicated by statute. When real estate is converted into money, whatever surplus remains after a proper application of the objects of the conversion, still represents the realty for the benefit of the heirs and cannot be merged in the personalty for purposes which pertain only to that classification." (Italics ours.)

Again in *Garnett vs. Carson,* 11 Mo. App. 290, the Court held:

> "It is quite settled that no order of sale of real estate can be made for the costs of administration. (Citing cases) * * * And again, these allowances to persons employed by the administrator for services rendered to the estate at the administrator's request, as to the reasonableness of which the Probate Court would never have been consulted, being costs of administration, as they clearly are, *would sub-*

ject the real estate to sale as debts of the deceased, which they are not." (Italics ours.)

In *McQuitty vs. Wilhite,* 218 Mo. 592, we find:

"So also it is said in 11 Am. and Eng. Ency. Law (2 Ed.) 838: 'At common law the real property of a decedent could not be *subjected to his simple contract debts,* but it descended directly to his heirs who became liable for the debts by specialty or matters of record, and in case of a deficiency of personal property the creditors by simple contract lost their debts. This rule of common law was changed by statute * * * and the real estate of a decedent, in case of a deficiency of personal property now descends to the heirs of the deceased owner, *subject to the payment of his debts,* for which purpose it may be sold in an appropriate proceeding." (Italics ours.)

In *Hannibal Trust Co. vs. Elzea,* 286 S. W. 371, the Supreme Court of Missouri in January, 1926, considered a will in connection with the provisions of Section 512 of the Revised Statutes of Missouri, which is as follows:

"A charge or encumbrance upon any real or personal estate for the purpose of furthering the payment of money or the performance of any covenant or agreement shall not be deemed a revocation of any will relating to the same estate previously executed but the devises and legacies therein contained shall pass and take effect subject to such charge or encumbrance."

On this the Court said:

"Again in the interpretation of statutes words in common use are to be construed in their natural, plain and ordinary significance, 36 Cyc. 1114. The words 'subject to' are defined by lexicographers as meaning 'liable for' and the word 'liable' is defined as 'bound or obliged in law or equity, responsible, answerable.' Webster's New International Diction-

> ary; Century Dictionary. Paraphrasing the last clause of the statute according to the natural and ordinary significance or meaning ascribed to the words used therein, it would read 'but the devises and legacies therein contained shall pass and take effect, answerable for and bound in law or equity with such charge or encumbrance.'"

See also *Fredelt vs. Fair Grounds R. E. Co.*, 69 S. W. 637, where the Court said:

> "In respect to the interest notes it is to be observed that the assignments were made subject to the deed of trust. The words 'subject to' when used in a connection like this mean 'charged with.' The assignment of the rents 'subject to the deed of trust' in effect charge the payment of the interest notes against the rents."

In this connection, it is also well to give further attention to the precise language of subdivision (a) of Section 402. It will be noted that in order to be properly included in the gross estate, the real estate in question must be "subject to the payment of the expenses of its administration." There can be no doubt that this language means that the property in question must be subject to the payment of the expenses of administration of the estate of the decedent. The statute does not prescribe that the property need only be "subject to" expenses of administration. It prescribes that the property must be subject to the *payment* of *the* expenses of administration of the estate of the decedent.

The word "the" preceding and modifying the word "expenses" means that the property in question must be subject to the payment of *all* expenses of administration. The word "the" when so used means "all". The word "the" has been on numerous occasions so construed.

Thus, this Court in *New York Trust Company vs. Eisner*, 256 U. S. 345, in construing the clause "Charges

against the estate" in the Revenue Act of 1916 held that such charges were only those which affected the estate *as a whole,* and therefore did not include taxes on the right of individual beneficiaries.

In *Adams vs. Pease,* 113 Ill. App. 356, 1. c. 360, the Court said:

> "Still another objection is that some of the instructions leave it to the jury to find the facts 'from *the* evidence' and not 'from the preponderance of the evidence'; and it is said that thereby the jury might find a fact from *some* of the evidence, and not from the *whole.* If this criticism is well founded, it applies with equal force to both phrases. A preponderance of the evidence would then also mean a preponderance of *some* of the evidence. In point of fact, the words 'the evidence' mean *all* the evidence."

In *Bailey vs. Homestead Fire Insurance Company,* 16 Hun. (N. Y.) 1. c. 506, the Court had before it a suit on an insurance policy and was called upon to construe a provision reading as follows: "This Company shall not be liable for any loss * * * if without written consent hereon, *the* property shall become incumbered in any way." The policy covered both real and personal property. Thereafter, a judgment lien accrued on the real property only. A fire destroyed a building which was covered by the policy and which was affected by the judgment lien. The Court held that the words *"the* property" referred to the *whole* property insured; that is, *all* the property covered by the policy.

In *Born vs. Home Insurance Company,* 110 Iowa 379, the Court was construing a policy of insurance against loss by fire, lightning, etc., covering both real and personal property, which policy provided that "if *the* property shall hereafter become mortgaged or incumbered" the policy should become null and void. The Court said:

"It is *the* property, not a part of it; not the real nor the personal, but the *whole,* property, the mortgaging of which renders the policy void. 'The property' is without qualification, and we think must be held to refer to *all* the property insured, and therefore mortgaging or incumbering a part of it did not work a forfeiture of the entire policy." (Italics ours.)

In *Bryan vs. Peabody Insurance Company,* 8 W. Va. 606, the Court was construing an insurance policy which provided that "if the above mentioned premises shall become occupied or used so as to increase the risk, or become vacant or unoccupied, and so remain for more than thirty days without notice to, and consent of, this Company * * * this policy shall be void." The Court said that this provision "must be construed to mean and apply to the *whole* or *entire* premises, as to its becoming vacant or unoccupied, and not merely to a part thereof. Had the Company intended otherwise, it is reasonable to suppose it would have so declared."

Hence, subdivision (a) of Section 402, providing that property, before it can be properly included in the gross estate of the decedent, must be "subject to" the *payment* of *the* expenses of administration of the estate, must be construed as requiring that property in question must be subject to the payment of all expenses of administration of the estate; that is, subject to the payment of expenses of administration *generally* or *as a whole.* The word *"the,"* read in the light of the context of subdivision (a), can have no other meaning.

Therefore the contention of the petitioner that the provision "subject to * * * the expenses of its administration" should be construed to mean that if under the law of a state the real property of a decedent could, as a practical matter be applied either directly or indirectly

to the payment of the expenses of administration, under any circumstances, is manifestly incorrect.

(b) The Word "and" in the Provision Does Not Mean "or" as Contended by the Appellant.

Under Point II the petitioner contends that in the phrase "subject to the payment of the charges against his estate and the expenses of its administration" the word "and" should be given the meaning of the word "or". Defendant adds that there is not in the English language a single word to express the idea "and/or", and adds, "the expression 'and/or' has not been used in the federal taxing statutes"; and then contends the word "and" in the phrase now in question was used in a sense which would have been more accurately expressed by the expression "and/or", or more simply by the word "or". There could be no occasion for the use of the expression "and/or" in a taxing statute which must be categorical. The expression "and/or" connotes an alternative, and the use of an alternative can only cast doubt and ambiguity on a taxing statute.

Several cases are cited by the petitioner in support of the proposition that it is the duty of the Court to ascertain the clear intention of the legislature and that in order to do so Courts are often compelled to construe "and" as meaning "or". In this particular case there is nothing to show that the legislature meant "or" and the only reason for construing the said word "and" to mean "or" would be to enable the Government to impose a tax upon property which otherwise might not be taxable. There is no ambiguity in the provision, and even if there were, under the decisions of this Court, the ambiguity should be construed in favor of the taxpayer. Moreover, this Court has construed the said paragraph in the case of *United States vs. Field, supra,* to the effect that the

word "and" in said paragraph means "and" and not "or".

IV.

(a) The Common Law Rule That Real Estate Is Not Subject to the Payment of the Expenses of the Administration of Decedent's Estates Has Not Been Modified by the Statutes of Missouri and Is in Full Force in Said State.

Under Point III of the petitioner's brief it is admitted that at common law real estate could not be sold for the payment of the administration expenses and that the common law is in effect in Missouri except as modified by statute. It is apparently contended that the common law has been so modified by statute as to subject the real estate to the payment of the expenses of administration at least under some circumstances. We deny the contention and we submit that the common law upon this subject is in full force and effect and has not been modified in any particular.

The Common Law of England, except as changed by statute, is in full force and effect in Missouri.

Lindell vs. McNair, 4 Mo. 380;
Beaume vs. Chambers, 22 Mo. 36;
Baker vs. Crandall, 78 Mo. 584;
R. S. Mo. 1879, Section 3117a;
R. S. Mo. 1899, Section 6551;
R. S. Mo. 1909, Section 8047;
R. S. Mo. 1919, Section 7084.

No authority need be cited for the proposition that, at common law, an administrator could have nothing to do with real estate. It was not even subject to the payment of debts of the deceased.

> "In some jurisdictions the statutes give to the executor or administrator a certain control over the land of decedent, usually either for the purpose of

preserving the same from waste during the course of administration, effecting a division and distribution among those entitled, or subjecting it to the payment of the decedent's debts in case the personal assets prove insufficient for this purpose. But such grants, being in derogation of the common law, must be strictly construed and the rights of the representative confined to those which are clearly given to him." (24 C. J., 133.)

In Missouri, the rule of common law was modified by the legislature in 1822 so that real estate became liable for debts of the decedent. In 1865 the law was further modified by the legislature so that the real estate became subject to the payment of legacies. In 1921, the law was further modified by the legislature of Missouri to subject the land of the decedent to the payment of the allowance to the widow in lieu of provisions. But otherwise the common law still applies to Missouri real property of a decedent and it cannot be held liable for, cannot be subjected to, and cannot be sold to pay, the expenses of administration of a decedent's estate. Under the decisions of the Missouri Courts, real estate of a decedent is not subject to the payment of the expenses of administration of his estate.

Farrar vs. Dean, 24 Mo. 16;
Presbyterian Church vs. McElhinney, 61 Mo. 540;
Teverbaugh vs. Hawkins, 82 Mo. 180;
Garnett vs. Carson, 11 Mo. App. 290;
In re *Motier's Estate,* 7 Mo. App. 514;
Ritchey vs. Withers, 72 Mo. 556;
State vs. Doud, 269 S. W. 923;
In re *Estate of Lloyd,* 44 Mo. App. 670;
Dilding vs. DeHart, 293 Mo. 393.
Howell vs. Jump, 140 Mo. 441;
Elstroth vs. Young, 94 Mo. App. 351.

The decisions of the Missouri Courts are in line with the decisions of the Courts of sister states rendered when,

under the then existing statutes of such sister states, real property could not be subjected to the payment of expenses of administration. These decisions of the sister states speak in no uncertain tones and are in line with the decisions already cited by the Appellate Courts of Missouri.

In *Drinkwater vs. Drinkwater,* 4 Mass. 354, the Court held—

> "And lands not being liable for the payment of debts at common law, they are made liable by statute, which does not extend the liability to the defraying of charges of administration. The personal estate alone is a fund for the payment of those charges."

To the same effect are:

Cary vs. Dennis, 13 Md. 1;
In re *Hatch,* 182 N. Y. 320;
Fitzgerald vs. Glancy, 49 Ill. 465;
Walker vs. Diehl, 79 Ill. 473;
Hollman vs. Bennett, 44 Miss. 322;
Moore vs. Ware, 51 Miss. 206;
Woerner, American Law of Administration, 3rd Ed., p. 1627.

(b) The Commission Allowed Upon the Sale of Real Estate to Pay Debts of a Decedent Is Not an Expense of Administration.

The petitioner contends that, where personal property is insufficient to pay debts, the administrator or executor, under the statutes of Missouri, can thereupon sell real estate sufficient to pay such debts, and that in such case all expenses of the sale are payable out of the proceeds of the sale, and that the Missouri statutes further entitle the executor or administrator "as full compensation for services and trouble a commission of five per cent." The petitioner argues this five per cent is an expense of administration.

Neither in fact nor in law is the payment of the five per cent an expense of the administration of the decedent's estate. There is no doubt that under the Missouri decisions real estate of a Missouri decedent descends to his heirs and does not come into the possession of the administrator as such for any purpose. It is true that Missouri statutes do permit the land of a decedent to be sold to satisfy legacies, debts or an allowance in lieu of provisions to the widow, where the personal property is insufficient for such purpose. Clearly, however, the administrator does not sell the real estate in such event as part of his duties as administrator because he has no right to administer upon the real estate. The real estate is not in any sense a part of the estate he is administering. He does not sell the real estate by virtue of his office as executor or administrator. It is true that he receives a commission of five per cent for his work and trouble in conducting the sale but that five per cent is payable to him just as the expenses of conducting the sale are payable to others, as part and parcel of the sale of real estate to satisfy particular purposes indicated by the statute and for no other purposes whatsoever. In selling real estate to pay debts, the administrator sells the same *not by virtue of his office,* but as a person specially designated by statute to convert into cash a sufficient amount of real property, not a part of the estate but outside of the estate being administered, so that such amount of cash may be inducted into the estate to meet the particuar purposes or one of them pointed out by the Missouri statute.

It was held in the case of In re *Rickenbaugh,* 42 Mo. App. 1. c. 338 that—

> "The right of an executor to sell land does not exist virtute officii; for, by virtue of his office, he has to deal only with personalty."

See also *United States vs. Field , supra,* 263, where this Court in dealing with the power of appointment, holds—

> "The appointed property is treated as equitable, not legal, assets of his estate; * * * and (in the absence of statute), if it passes to the executor at all, it does so not by virtue of his office but as a matter of convenience and because he represents the rights of creditors."

It seems to involve a contradiction in terms to say that an executor under the Missouri Statutes will be permitted by the Courts to use the proceeds of the sale of real estate to pay expenses of administration and, on the other hand, to admit that no Probate Court of Missouri can make an order to subject the real estate of a decedent to such purpose. It cannot be that the Missouri Statutes authorize the payment of expenses of administration out of the proceeds of the sale of real estate, in the face of the conceded fact that the statutes do not authorize the use of the proceeds of the sale of real estate for such purpose.

> In re *Hatch,* 182 N. Y. 320;
> *Cook vs. Woodward,* 5 Dem. Sur. 97.

In petitioner's brief, page 52, we find—

> "The question as to whether, when a sale has been made to meet the payment of debts, the proceeds of the sale may be used to meet the payment of administration expenses is one upon which the Missouri decisions *are not entirely clear.*" (Italics ours.)

If the Missouri decisions upon which appellant relies "are not entirely clear," then appellant's entire position is wrong. The right to impose a tax must be clear and free from doubt. The petitioner refers to Section 149 of the Revised Statutes of Missouri. That Section must

be read in conjunction with the preceding and succeeding Sections of the Missouri Statutes which deal with the proceeds of sale of real estate, not as administration sales under orders of the Probate Court, but to satisfy judgments and attachments. That statute provides that the proceeds of such sales, after satisfying the judgments and attachments and other liens, become assets in the hands of the administrator, "to be administered according to law." The clause quoted means according to the administration law of the State of Missouri as interpreted by the Missouri Courts. It has been ruled by Missouri decisions (see *State vs. Doud, infra,* and other cases cited) that the surplus moneys growing out of the sales of real estate under order of the Probate Court after the satisfaction of debts and expenses of the sale are the same as real estate and belong to the heirs and devisees, and cannot be used for any other purpose. To the same effect are the decisions where sales of real estate of the decedent produce a surplus after satisfying judgments, attachments or mortgage liens. The surplus funds on hand after satisfying such judgments, attachments and mortgage liens and after payment of expenses of sale, are likewise held to constitute real estate and belong to the heirs and devisees, and cannot be used for any other purpose.

This same question was considered by Chief Justice Parsons in *Drinkwater vs. Drinkwater,* 4 Mass. 354, construing a Massachusetts Statute similar in import to the provisions of the Missouri Law now under consideration wherein the Court after holding that the proceeds of real estate sold for the purpose of paying debts could not be used to pay administration expenses stated in considering and distinguishing the costs of the sale of the real estate and the cost of accounting for the proceeds:

> "Also when lands, of which the intestate died seized, are sold on license for the payment of debts, the Court authorizes the sale of lands enough to defray the charges of the sale, and of accounting for the proceeds. Because the statute giving an administrator a power to sell lands on license, the Court granting the license must, by a reasonable construction, have authority to indemnify him in executing the power. So also a judgment creditor may levy his execution for his costs as well as his damages, on the land."

It will be thus seen that the Massachusetts Court clearly distinguished between administration expenses and the costs of the sale and the costs of accounting for the proceeds.

(c) The Petitioner in Its Brief Has Misconstrued Certain Decisions of the Missouri Courts.

In Appendix C of the petitioner's brief is an analysis of the laws of Missouri and the decisions of the Courts of Missouri which it is urged prove that under some circumstances as a practical matter the real estate may be sold to pay the expenses of the administration. But the appellant arrives at his conclusions in said discussion only by misconstruing the plain purport of some of the decisions of the Court of Missouri and by minimizing the force of other decisions of said Courts.

The language of one of the conditions of paragraph 402 (a) is that the interest of the decedent must be "subject to the payment of the expenses of its (the estate's) administration." The Courts of Missouri have uniformly held that in that state under no conditions can real estate be sold to pay *the* expenses of the administration of an estate.

Farrar vs. Dean, 24 Mo. 16;
Presbyterian Church vs. McElhinney, 61 Mo. 540;

Teverbaugh vs. Hawkins, 82 Mo. 180;
Garnett vs. Carson, 11 Mo. App. 290;
Howell vs. Jump, 140 Mo. 441.

The fact that under the laws of Missouri the real estate of a deceased person cannot be sold to pay the administration expenses would seem to be conclusive that such real estate is not subject to the payment of the expenses of the administration of an estate within the meaning of Section 402 (a) of the Revenue Act of 1918. Certainly, property that cannot be sold to pay such expenses is not subject to the payment of said expenses. But the Courts of Missouri have gone further than that and have held that the proceeds derived from the sale of real estate made for the purpose of paying debts and legacies cannot be used to pay administration expenses. Thus, in the comparatively late case of *State vs. Doud,* 269 S. W. 924, the Court of Appeals again adhered to this well established principle, saying that:

> "If the real estate is sold by order of the Probate Court for the payment of the debts of the decedent, *any surplus of the proceeds of the sale remaining after payment of the debts goes to the heir or devisee.* * * * In other words, when real estate is converted into money for the payment of the debts of the decedent, *the surplus of the proceeds of the sale remaining, after payment of the debts, retains the character of real estate for the purpose of succession or distribution,* and goes to the person in whom the title to the real estate was vested when it was converted." (Italics ours.)

The Court of Appeals of Missouri in the case of In re *Motier's Estate,* 7 Mo. App. 514, at page 517, said:

> "The land belongs to the heirs. It cannot be touched for any of the purposes of the administration, except in the specific mode and for the specific objects elsewhere indicated by statute. When real

> estate is converted into money, whatever surplus remains after a proper application of the objects of the conversion still represents the realty for the benefit of the heirs and cannot be merged in the personalty for purposes which pertain only to that classification."

In the case of *Ritchey vs. Withers,* 72 Mo. 556, the Supreme Court of Missouri, at page 559, announced the principle that:

> "The County Court had no power to order the sale of real estate except for the payment of debts, and when it was sold for that purpose, the proceeds arising from the sale could not be diverted from it and applied to another and different purpose."

In *Elstroth vs. Young,* 94 Mo. App. 351, referred to on page 54 of appellant's brief, the Court of Appeals of Missouri recognized the decision in *Ritchey vs. Withers* as controlling, saying:

> "The proceeds of the sale of the lands made by an order of the Probate Court in pursuance of the provision of Chapter I, Article 8, Revised Statutes, 1899, cannot be used for the purpose of making good deficiencies in the expenses of administration. *Ritchey vs. Withers, 72* Mo. 556."

The case of *Elstroth vs. Dickmeyer,* 88th Mo. Appeal 418 which was later before the Court as *Elstroth vs. Young,* 94 Mo. Appeal 351, do not sustain the contentions made on page 54 of the petitioner's brief. Attention is invited to the discussion by the court below of the effect of those decisions. (R. pages 14-15.) However, whatever may have been the effect of the decision in the case of *Elstroth vs. Dickmeyer,* the ultimate decision in the case of *Elstroth vs. Young* certainly sustains the contention which we make. The language of the latter decision is—

> "The proceeds of the sale of the lands * * * cannot be used for the purpose of making good deficiencies in the expenses of administration."

It will thus be seen that the Courts of Missouri in their interpretation of the administration law of the state have decided without a dissenting voice that real estate cannot be sold to pay the expenses of administration, and that if it is sold upon an insufficiency of personalty for the purpose of paying debts or legacies, the proceeds cannot be used to pay the administration expenses. Certainly then, it cannot be said that real estate in Missouri is "subject to the payment of the expenses of administration."

The case of *Howell vs. Jump,* 140 Mo. 442, referred to on page 54 of the appellant's brief and relied on by the Court of Claims in the *Steedman* case, was not a controversy involving the question whether or not the real estate of a decedent might be used to pay the expenses of administration of the estate, but to determine whether or not a purchaser at an administrator's sale could be divested of his title because the administrator misapplied the proceeds of the sale to the payment of the expenses of administration contrary to the statute. Even the most casual reading of the *Jump* case shows that the case is exactly in line with our contention and opposed to the appellant's contention. That case dealt with a question of title to real estate growing out of an order made by the Probate Court to sell the particular property, which order was limited to a petition of the administrator to sell the land to pay debts. The administrator used the proceeds of the sale of that land not only to pay debts but to pay administration expenses. Upon learning these facts, the heirs filed suit to set aside the sale because the administrator used the proceeds of the sale for an unlawful purpose. The decision holds that since the order

of sale complied with the statute, the purchaser at the administrator's sale obtained a good title which was not affected by the fact that the administrator subsequently misused or misapplied the funds growing out of the sale. It will be observed that the decision is bottomed on the proposition of law for which we are contending, and the decision does not in any way hold that the land could properly be subjected to the payment of expenses of administration.

In both Courts below this petitioner relied upon the *Jump* case to support its contentions but after careful consideration of that case the District Court said (R. page 9), "Clearly this case not only does not conflict with but supports plaintiff's theory," and the Circuit Court of Appeals held likewise. (R. page 15.)

CONCLUSION

Respondent submits that:

(1) No property may be included in the gross estate of decedents for taxation purposes under Section 402 (a) of the Revenue Act of 1918, unless such property is inter alia subject to the payment of the expenses of administration of decedent's estate.

(2) Real estate in the State of Missouri is not subject to the payment of the expenses of administration of decedents' estates and, therefore, is not within the purview of said provision.

(3) The property of the decedent which is sought to be included in the gross estate for taxation purposes in the instant case is real estate in Missouri and it is not claimed by the petitioner that it is taxable under any law except said paragraph (a) of said Section 402.

(4) The Circuit Court of Appeals held that said prop-

erty is not taxable under said provision and said decision should be affirmed.

Respectfully submitted,

FRANK S. BRIGHT,
Attorney.

S. L. SWARTS,
MASSEY HOLMES,
L. C. CONNALLY,
H. STANLEY HINRICHS,
BRIGHT, THOMPSON, HINRICHS & WARREN,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 24.—October Term, 1930.

Noah Crooks, Collector of Internal Revenue, Petitioner, *vs.* Benjamin Harrelson, et al. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[November 24, 1930.]

Mr. Justice Sutherland delivered the opinion of the Court.

Benjamin H. Harrelson, a resident of Missouri, died testate in 1920, leaving within the state property and assets which included real property valued at over $269,000. The Commissioner of Internal Revenue, upon a final audit and review of the federal estate tax return of the executors made under the Revenue Act of 1918, included the real property as a part of the gross estate for the purpose of computing the tax. The executors paid $37,762.20, the amount attributable to the value of the real property, and subsequently claimed a refund thereof on the ground that the value of the decedent's real property having its situs in Missouri was not, under the law of that State and the terms of the federal statute, properly subject to an estate tax, and the amount was, therefore, illegally assessed and collected. The estate having been closed and distributed and the executors discharged, plaintiffs (respondents here), as sole beneficiaries and distributees, brought this action in a federal district court against the defendant (petitioner here) to recover the amount so paid and claimed, together with interest. Defendant demurred to the complaint on the ground that the facts stated were not sufficient to constitute a cause of action. The district court overruled the demurrer, and defendant having declined to plead further, rendered judgment against him for the sum claimed, with interest and costs. 28 F. (2d) 510. Upon appeal the circuit court of appeals affirmed the judgment. 35 F. (2d) 416.

A correct determination of the question presented requires consideration of the provisions of § 402 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1097-8, the relevant portion of which follows:

"Sec. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

"(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate;"

The court below held—(1) that by the express provisions of the foregoing section, the value of the interest of a decedent in any property at the time of his death may not be included in the gross estate for the purpose of the tax unless there be a concurrence of the requirements there set forth, namely, (a) that the interest of the decedent be subject to the payment of the charges against his estate, (b) that such interest be subject to the expenses of administration, and (c) that such interest be subject to distribution as part of his estate; and (2) that by the law of Missouri such interest in real property is not subject to the expenses of administration, and, therefore, the requirement in that respect is not met. Both propositions are controverted by the petitioner.

First. The meaning of the provision in question, considered by itself, does not seem to us to be doubtful. The value of the interest of the decedent is not to be included unless it "is subject to the payment of the charges against his estate *and* the expenses of its administration"—not one or the other, but both. We find nothing in the context or in other provisions of the statute which warrants the conclusion that the word "and" was used otherwise than in its ordinary sense; and to construe the clause as though it said, "to the payment of charges and expenses, *or either of them*," as petitioner seems to contend, would be to add a material element to the requirement, and thereby to create, not to expound, a provision of law. Nor will it do to say that the words, "*charges* against his estate," include expenses of administration, for plainly they are different and distinct things, generally so classified in the settlement of estates of decedents, and so regarded by Congress, as evidenced by the discriminating terms of the statute.

A similar question was presented to this court and decided in *United States* v. *Field,* 255 U. S. 257. It was there held that the interest of the decedent, Mrs. Field, was not taxable under § 202 (a) of the Revenue Act of 1916, reenacted as clause (a) of § 402 now

under review, because it was not her property at the time of her death, nor subject to distribution as part of her estate. The court said (p. 262):

"The conditions expressed in clause (a) are to the effect that the taxable estate must be (1) an interest of the decedent at the time of his death, (2) which after his death is subject to the payment of the charges against his estate and the expenses of its administration, and (3) is subject to distribution as part of his estate. These conditions are expressed conjunctively; and it would be inadmissible, in construing a taxing act, to read them as if prescribed disjunctively. Hence, unless the appointed interest fulfilled all three conditions, it was not taxable under this clause."

It is to be observed that the court, by combining under one head the provision in respect of charges against the estate and that in respect of expenses of administration, treated clause (a) as containing three conditions instead of four; but this does not alter the fact that, whether stated separately or in combination, the second condition contains two distinct requirements, expressed conjunctively, and may not be read as though stated disjunctively. It seems clear enough that the *Field* case is decisive of the question and requires us to hold that if the value of the interest of the decedent now being considered is not subject, under the law of Missouri, to the expenses of administration, it forms no part of the gross estate for the purpose of the federal estate tax.

It is urged, however, that if the literal meaning of the statute be as indicated above, that meaning should be rejected as leading to absurd results, and a construction adopted in harmony with what is thought to be the spirit and purpose of the act in order to give effect to the intent of Congress. The principle sought to be applied is that followed by this court in *Holy Trinity Church* v. *United States,* 143 U. S. 457; but a consideration of what is there said will disclose that the principle is to be applied to override the literal terms of a statute only under rare and exceptional circumstances. The illustrative cases cited in the opinion demonstrate that to justify a departure from the letter of the law upon that ground, the absurdity must be so gross as to shock the general moral or common sense. Compare *Pirie* v. *Chicago Title and Trust Company,* 182 U. S. 438, 451-452. And there must be something to make plain the intent of Congress that the letter of the statute is not to prevail. *Treat* v. *White,* 181 U. S. 264, 268.

Courts have sometimes exercised a high degree of ingenuity in the effort to find justification for wrenching from the words of a statute a meaning which literally they did not bear in order to escape consequences thought to be absurd or to entail great hardship. But an application of the principle so nearly approaches the boundary between the exercise of the judicial power and that of the legislative power as to call rather for great caution and circumspection in order to avoid usurpation of the latter. *Monson* v. *Chester,* 22 Pick. 385, 387. It is not enough merely that hard and objectionable or absurd consequences, which probably were not within the contemplation of the framers, are produced by an act of legislation. Laws enacted with good intention, when put to the test, frequently, and to the surprise of the law maker himself, turn out to be mischievous, absurd or otherwise objectionable. But in such case the remedy lies with the law making authority, and not with the courts. See *In re Alma Spinning Company,* L. R. 16 Ch. Div. 681, 686; *King* v. *Commissioners,* 5 A. & E. 804, 816; *Abley* v. *Dale,* L. J. (1851) N. S. Pt. 2, Vol. 20, 233, 235. And see generally *Chung Fook* v. *White,* 264 U. S. 443, 445; *Commr. of Immigration* v. *Gottlieb,* 265 U. S. 310, 313.

In support of the claim that a literal construction is not admissible, it is said that by other provisions of § 402 certain interests in real property, such as dower, etc., are made subject to the tax without regard to the conditions set forth in subdivision (a), and that this results in an incongruity amounting to an absurdity. But unless the Constitution be violated, Congress may select the subjects of taxation and qualify them differently as it sees fit; and if it does so in plain terms, as it has done here, it is not within the province of the court to modify the law by construction. In any event, conceding that the conditions assailed have produced the incongruous results complained of, they fall far short of that degree of absurdity contemplated by the *Holy Trinity Church* case, or by any other decision of this court.

Finally, the fact must not be overlooked that we are here concerned with a taxing act, with regard to which the general rule requiring adherence to the letter applies with peculiar strictness. In *United States* v. *Merriam,* 263 U. S. 179, 187-188, after saying that "in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be ex-

tended by implication beyond the clear import of the language used," we quoted with approval the words of Lord Cairns in *Partington* v. *Attorney-General,* L. R. 4 H. L. 100, 122, that "if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute."

Second. It is conceded by the petitioner, as it must be, that at common law real estate cannot be sold to pay expenses of administration, and that this rule of the common law is in effect in Missouri unless modified by statute. It is further conceded that there is no statute which permits real estate to be sold merely to pay such expenses. One contention, however, is that an executor or administrator may be authorized by the proper court to sell real estate to pay debts and legacies if the personal estate is insufficient; and that upon such sale the executor or administrator is entitled to a commission on the proceeds of the sale, which takes priority over the payment of debts against the estate. As to this it is sufficient to say, as the court below said, that this commission is not an expense of administration, but an expense incidental to the sale of the lands. The Missouri Court of Appeals, in *Elstroth* v. *Young,* 94 Mo. App. 351, 355-356, held that the proceeds of the sale of lands so made could not be used to make good deficiencies in the expenses of administration.

The further contention that if the personal estate has been consumed by administration expenses and real estate is sold to pay debts and legacies, as a practical matter, real estate has been sold because of administration expenses, we put aside as inconsequential. In the case supposed it is perfectly evident that the real estate has been sold not to pay administration expenses, but to pay debts and legacies, and that fact is in no wise altered because the sale was necessitated by the consumption of the personalty for such expenses. The cause of the sale must not be confused with its purpose.

Nothing would be gained by a review of the numerous decisions of the Missouri courts. They are set forth and fully and well con-

sidered by the court below, and we entirely agree with that court's conclusion that these decisions establish "that real estate of a decedent in that state cannot be sold for the payment of expenses of administration, nor can the proceeds of land sold to pay debts be lawfully used to pay expenses of administration."

We have not failed to note the decision of the Court of Claims in *Steedman* v. *United States*, 63 C. Cls. 226, as well as the decision of the Board of Tax Appeals in *Bartlett* v. *Commissioner*, 16 B. T. A. 811, 816, but in so far as they conflict with the foregoing conclusions, they are disapproved.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.